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Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985

No. _____

VOLKSWAGEN OF AMERICA, a corporation
and
VOLKSWAGENWERK A.G., a corporation

Petitioners,

vs.

PHYLLIS A. ROSSELL, guardian ad litem
of JULIE ANN KENNON, a minor,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARIZONA

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QUESTIONS PRESENTED

(1) Did the decision of the Supreme Court of Arizona deny Petitioners the equal protection of the laws by drawing a distinction between classes of defendants with regard to the need for expert testimony to establish negligence on the basis of the nature of the defendants' relationships with their customers?

(2) Did the conduct of the Supreme Court of Arizona in this case deprive Petitioners of property without due process of law in that:

(a) the court failed to adhere to its own procedural rules regarding the specification of issues upon which review is granted?

(b) the court based its decision upon "facts" that were not contained in the record?

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Petitioners,

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PHYLLIS A. ROSSELL, guardian ad litem
of JULIE ANN KENNON, a minor,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARIZONA

Petitioners Volkswagen of America and Volkswagenwerk A.G. petition for a writ of certiorari to review the decision of the Supreme Court of the State of Arizona.

OPINIONS BELOW

The opinion of the Supreme Court of Arizona, No. 17778-PR, slip op. (Ariz. Oct. 28, 1985), is set forth in Appendix A ("App. A"). The order of the Supreme Court of Arizona denying Petitioners' Motion for Reconsideration, No. 17778-PR, order (Ariz. Dec. 18, 1985), is set forth in Appendix B ("App. B"). The opinion of the Arizona Court of Appeals, No. 1 CA-CIV 5589 (Ariz. Ct. App. Aug. 30, 1984), is set forth in Appendix C ("App. C").

JURISDICTION

The decision of the Supreme Court of the State of Arizona was entered on October 28, 1985. A timely motion for reconsideration was denied by an order dated December 18, 1985. This Court's jurisdiction is invoked pursuant to the provisions of 28 U.S.C. § 1257(3) (1982).

STATUTES INVOLVED

This case involves the first section of the Fourteenth Amendment to the Constitution of the United States and Rule 23(f) of the Arizona Rules of Civil Appellate Procedure. These provisions are set forth in Appendix D ("App. D").

STATEMENT OF THE CASE

Petitioners recognize that negligence is not an area of law usually addressed by this Court and that this Court's function is not to correct factual errors occurring in the courts below. The issues raised in this Petition, however, involve neither principles of negligence law nor mere mistakes of fact. Rather, they involve a state supreme court's fabrication of facts to justify its legal conclusions, fundamentally compromising the constitutional safeguards to which petitioners were entitled. Specifically, the court, with neither factual nor precedential support, segregated a particular class of defendants and subjected them to an onerous, unjustified and inequitable evidentiary burden, a burden not imposed by any other jurisdiction. Additionally, the court disregarded its own procedural rules and tailored the facts of the case so as to support the result which it sought to reach. When a state court, in its zeal to permit an injured plaintiff to recover damages, uses its unquestioned authority to mold tort law in a manner that subverts constitutional rights, this Court's intervention is essential.

This action for personal injuries sustained in a one-car accident was filed on May 28, 1975. At the time of the accident, Julie Ann Kennon was a passenger in a 1958 Volkswagen Type I Sedan, commonly known as the "Bug" or the "Beetle," driven by her mother. On September 25, 1979, a jury trial commenced. The only issue submitted to

the jury was whether petitioners had negligently designed the battery system by locating the battery under the rear passenger seat and by failing to anticipate the replacement of their battery with another battery too large to fit within the battery restraint. [1] The issue of strict liability for the design of the battery system [2] was resolved in petitioners' favor in the context of a motion for partial summary judgment.

On November 16, 1979, the jury returned a verdict of $1,500,000.00 in favor of plaintiff. After the entry of the formal written judgment on November 20, 1979, petitioners moved for a judgment n.o.v. or, alternatively, for a new trial. On June 27, 1980, the trial court denied these motions.

On July 28, 1980, petitioners filed their notice of appeal to the Arizona Court of Appeals, appealing from both the judgment and the order denying their post-trial motions. The Court of Appeals reversed, holding, *inter alia*, that expert testimony was required to establish the standard of care applicable to motor vehicle manufacturers in 1958 [3] and that plaintiff had failed to produce such testimony. Slip op. at 7, 9.

Subsequently, plaintiff filed a petition for review with the Arizona Supreme Court. That petition was granted by an

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[1] Unlike the majority of vehicles manufactured in 1958, the Volkswagen Beetle was a rear-engine, subcompact vehicle which necessitated the different placement of a variety of vehicle components. The battery was located under the rear passenger seat near the rear engine compartment in a location protected from vehicle impacts. Because of its efficient design, smaller sized batteries than needed in larger cars were recommended.

[2] As used herein, the phrase "battery system" includes the battery, the location of the battery, the battery cover and the battery restraint.

[3] In accordance with established principles of Arizona law, the Court of Appeals reached this conclusion because, without the benefit of expert testimony, the jury could not have determined, within its common understanding, whether in the exercise of ordinary care a safer design was feasible. 1 CA-CIV 5589, App. C at 6.

order dated December 18, 1984. On January 3, 1985, petitioners filed a request for specification of the issue or issues to be reviewed. That request is set forth in Appendix E ("App. E"). In response to this request, pursuant to Rule 23(f) of the Arizona Rules of Civil Appellate Procedure, on January 22, 1985, the Supreme Court of Arizona entered an order declaring that, "[r]eview is granted on both issues decided by the court of appeals." That Order is set forth in Appendix F ("App. F").

On October 28, 1985, the Supreme Court of Arizona rendered its opinion vacating the opinion of the Court of Appeals and affirming the judgment of the trial court. In the course of its opinion, the court mischaracterized petitioners' argument regarding the need for expert testimony to establish the applicable standard of care for automobile manufacturers in 1958. The court wrongly transformed this argument into a contention that the existence of a manufacturer's liability depends upon proof of a deviation from the standard of care in design followed by other manufacturers.[4] No. 17778-PR, App. A at 10. The court then concluded that expert testimony was required only in cases of professional malpractice, in which defendants are held to a higher standard of care than that demanded of an

[4] Petitioners repeatedly have disclaimed reliance upon this position. *See e.g.*, Defendants' Supplemental Brief on Review, pp. 2-3. In light of the evidence that less than 5% of all cars had batteries located inside the passenger compartment, it is absurd to maintain that petitioners sought to absolve themselves from negligence on the basis of an industry custom with which they did not comply.

ordinary, prudent person.[5] *Id.* at 8-9. It reached this conclusion on the basis of the special nature of the relationship between a "professional"[6] and his clients.[7] It, therefore, made the necessity for expert testimony contingent upon the type of defendant involved in the action. Because of its determination that expert testimony was not required, the court concluded that plaintiff had presented a prima facie case of negligence. The

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[5] Had the court focused upon the standard of care applicable to product manufacturers rather than the nature of their relationships with consumers, it would have reached a contrary result. As a matter of negligence law, it is well established that in preparing a product for sale and in examining that product, a manufacturer is held to the standard of an expert in the field. *Dartez v. Fibreboard Corp.*, 765 F.2d 456, 461 (5th Cir. 1985); *Brady v. Melody Homes Manufacturer*, 121 Ariz. 253, 259, 589 P.2d 896, 902 (Ariz. Ct. App. 1978); W. Prosser & W. Keeton, *The Law of Torts* § 96 at 684 (5th ed. 1984). In fact, at trial the jury was so instructed. *See* No. 1 CA-CIV 5589, App. C at 4. Hence, under the rationale announced by the Supreme Court of Arizona, it is clear that expert testimony should have been required in this case.

[6] The court attempts neither to define what is meant by the term "professional" nor to draw a fine line distinguishing the professions from other occupations. The impossibility of drawing such a line can be seen from the facts of this case. The persons responsible for the allegedly negligent design of the Beetle are engineers employed by Volkswagen. Under any normal construction of the term "professionals," it is clear that engineers would fit within that classification. In fact, the court characterizes "engineers" as professionals. No. 17778-PR, App. A at 10.

[7] In this regard, the court declares that the requirement that negligence be established with reference to professional norms

> has not been applied in commercial settings, probably because the danger of allowing a commercial group to set its own standard of what is reasonable is not offset by professional obligations which tend to prevent the group from setting standards at a low level in order to accommodate other interests.

No. 17778-PR, App. A at 9. The court justifies this distinction on the basis of its unsubstantiated assertion that professionals, unlike product manufacturers, "generally work in close relationship with their clients or patients." *Id.* at 10.

court then proceeded to consider the issues that had not been addressed by the Court of Appeals.

Petitioners filed a motion for reconsideration with the Arizona Supreme Court on November 21, 1985. A copy of that motion is set forth in Appendix G ("App. G"). In that motion, petitioners argued, *inter alia*, that the court's decision denied them the equal protection of the law, and that the court violated petitioners' due process rights [8] by relying upon fabricated facts and by disregarding its own procedural rules. This motion was denied by an order dated December 18, 1985.

REASONS FOR GRANTING THE PETITION

I. *The Decision of the Supreme Court of Arizona Denied Petitioners the Equal Protection of the Laws.*

The Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States requires the states to govern impartially and precludes them from drawing distinctions between individuals or classes of individuals on bases that are irrelevant to the legitimate objectives of government. *Lehr v. Roberts*, _____ U.S. _____, _____, 103 S. Ct. 2985, 2995 (1983). For the purposes of the Fourteenth Amendment, the decisions rendered by the highest court of a state are equivalent to the actions of the state legislature. *Prudential Insurance Co. v. Cheek*, 259 U.S. 530, 548, 42 S. Ct. 516, 524 (1922). The Equal Protection Clause, therefore, forbids the arbitrary classification of persons by the judiciary. *Sexton v. Barry*,

[8] Although not raised until the motion for reconsideration, the constitutional arguments advanced herein are timely. With regard to the equal protection claim, prior to the issuance of the Arizona Supreme Court's opinion, petitioners had no indication that the court would draw a distinction among classes of defendants concerning the need for expert testimony. Similarly, with regard to the due process claims, petitioners could not have known that the court would rely upon fabricated facts or that it would disregard its own procedural rules prior to the issuance of its initial opinion.

233 F.2d 220, 224 (6th Cir.), *cert. denied*, 352 U.S. 870 (1956); *Republic Pictures Corp. v. Kappler*, 151 F.2d 543, 547 (8th Cir. 1945), *aff'd*, 327 U.S. 757 (1946).

The Equal Protection Clause, of course, does not forbid all classifications of persons by the government. Rather, it requires "some rationality in the nature of the class singled out." *Rinaldi v. Yeagher*, 384 U.S. 305, 308-309 (1968). Hence, under traditional equal protection analysis, a classification will be sustained unless it is patently arbitrary and bears no rational relationship to a legitimate state interest.[9] *Regan v. Taxation With Representation of Washington*, _____ U.S. _____, _____, 103 S. Ct. 1997, 2001-2002 (1983). Under this so-called "rational basis" test, a classification must rest upon some ground of difference having a fair and substantial relation to the object of the classification, such that all persons similarly circumstanced shall be treated alike. *Reed v. Reed*, 404 U.S. 71, 76 (1971).

The Arizona Supreme Court's opinion violates this basic precept by adopting one standard of proof for negligence claims against professionals and another standard for

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[9] Classifications which impinge on fundamental rights are subject to more rigorous examination. *Regan v. Taxation With Representation of Washington*, _____ U.S. _____, _____, 103 S. Ct 1997, 2002 (1983). Under this strict scrutiny, a classification is invalid unless it advances a compelling state interest by the least restrictive means. *Bernal v. Fainter*, _____ U.S. _____, _____, 104 S. Ct. 2312, 2316 (1984). Ready access to the courts is a fundamental constitutional right. *McKay v. Hammock*, 730 F.2d 1367, 1375 (10th Cir. 1984); *Winters v. Miller*, 446 F.2d 65, 71 (2d Cir.), *cert. denied*, 404 U.S. 985 (1971). Therefore, because the classification adopted by the Supreme Court of Arizona in this case adversely affects the ability of certain classes of defendants to obtain the fair adjudication of their rights, it is arguably subject to strict scrutiny.

negligence claims against manufacturers.[10] While conceding the need for expert testimony to establish liability in "professional" malpractice cases, the state court held that, in a complex design case in which all sides recognized the need for and in fact relied upon expert proof, expert testimony was unnecessary to establish the relevant standard of care and defendants' alleged deviation therefrom. The court attempted to justify the distinction between "professionals" and other defendants on the basis of its factually unsupported assumption that all manufacturers callously disregard the public welfare in pursuit of increased profits. According to the court, professionals are not subject to such base motives, due to their "close relationship with their clients or patients". This purported distinction cannot withstand even minimal scrutiny under the Equal Protection Clause.

Concededly, a distinction may be drawn between those cases that require expert testimony and those that do not. The question, therefore, is where to draw the line. The purpose of evidentiary rules is to facilitate the ascertainment of the truth and to ensure the just determination of disputes. *See* Ariz. R. Evid. 102. To this end, expert testimony traditionally has been required in those cases in which the appropriate standard of care is not a matter of common knowledge. *See* Ariz. R. Evid. 702; M. Udall & J. Livermore, Law of Evidence § 25 at 43-44 (2d ed. 1982). Hence, its necessity has depended upon the relative complexity or sophistication of the factual issues involved. Distinctions

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[10] In making this argument, petitioners are aware of the various decisions of this Court to the effect that the Fourteenth Amendment does not assure uniformity of judicial decisions or immunity from judicial error. *E.g., Beck v. Washington*, 369 U.S. 541, 554-55 (1962); *Milwaukee Electric Railway & Light Co. v. Wisconsin ex rel. Milwaukee*, 252 U.S. 100, 106, (1920). Petitioners do not argue that the state court violated the Equal Protection Clause by rendering an incorrect decision. Rather, they contend that the classification utilized by the state court in reaching its result is not rationally related to the attainment of any legitimate governmental objective.

based on the complexity of factual issues clearly are rationally related to the legitimate public purpose of assuring the just resolution of disputes.

In this case, however, the Arizona court changed the focus of the inquiry from the complexity of the issues to the mere identity of the defendant or the class to which it belongs. [11] This distinction is not rationally related to the goal of justly resolving negligence controversies. Certainly design defect cases, which essentially allege automotive engineering malpractice, can involve issues every bit as complex and incomprehensible to lay jurors as factual issues involved in "professional" malpractice actions. [12] Yet, under the court's opinion, expert testimony is unnecessary to establish the negligence of a manufacturer so long as its product is mass-produced and the manufacturer has no interaction with the ultimate consumer. The arbitrary, factually unsupportable classification adopted by the Arizona Supreme Court, based

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[11] According to the state court's opinion, professional malpractice consists of a deviation from the custom of the particular profession, and cannot be proved without expert testimony. No. 17778-PR, App. A at 8. The conduct of all manufacturers and other "non-professional" defendants, on the other hand, is assessed with reference to the apocryphal "reasonable man," and may be characterized as negligent without expert testimony to that effect. *Id.* at 7-8.

[12] For example, a valid finding of negligence in the case at bar would require the jury to consider the dangers inherent in the battery restraint system as designed, the benefits attendant to such design, feasible design alternatives, the cost of the restraint system relative to the cost of the alternatives, and the dangers associated with the alternate designs, all within the time frame within which the vehicle was manufactured and released to the public, i.e., 1958. Surely such information is beyond the knowledge and experience of the typical juror. In recognition of this fact, the Court of Appeals held that

> the issue of whether Volkswagen's placement of the battery inside the passenger compartment of the 1958 vehicle and the design of the tie-down system in 1957 violated the applicable standard of care is sufficiently a technical design matter that expert witness testimony is required.

No. 1 CA-CIV 5589, App. C at 6.

upon its perception of the differences in integrity between "professionals" and all others, is not rationally related to the goal of assuring the just resolution of disputes or to any other legitimate state purpose. It is, therefore, violative of the Equal Protection Clause of the Fourteenth Amendment.

II. *The Conduct of the Arizona Supreme Court in this Case Deprived Petitioners of Property Without Due Process of Law.*

The Due Process Clause of the Fourteenth Amendment of the Constitution of the United States provides that the states may not "deprive any person of life, liberty, or property without due process of law." U.S. Const. Amend. XIV § 1. Because "[t]he touchstone of due process is protection of the individual against arbitrary action of government," *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974), the Due Process Clause acts as a restraint upon the powers exercised by each of the three branches of government. *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 276 (1855). Due process entails "such process as may be required to minimize substantially unfair or mistaken deprivations of the entitlements conferred by law upon private individuals or groups." L. Tribe, *American Constitutional Law* § 10-7 at 503 (1978); *see Fuentes v. Shevin*, 407 U.S. 67, 97 (1972). Once it has been determined that life, liberty or property is at stake, the constitutional inquiry then focuses on the nature and extent of the "process" that is "due."[13] J. Nowak, R. Rotunda & J. Young, *Constitutional Law* Ch. 15, § I at 527 (2d ed. 1983). The Arizona Supreme Court's decision in this case violated petitioners' due process rights in two respects.

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[13] Because there can be no serious question that the Arizona Supreme Court's decision, if permitted to stand, will deprive petitioners of property, petitioners' argument will examine the nature of procedural protections required prior to such deprivation.

A. *The Court's Reliance on Facts Not Contained in the Record Violated Due Process.*

The conclusions of the Arizona Supreme Court supporting the court's creation of the double evidentiary standard now applicable to negligence cases in Arizona, and concerning the evidence presented in this case, are based upon fabricated facts that are neither matters of record, reasonable inferences drawn therefrom, nor facts subject to judicial notice. [14] As a result, the court violated the basic tenet that its duty is to apply general principles of law to specific facts, and not to tailor the law or the facts to fit a preconceived result. *See Commercial Standard Insurance Co. v. Cleveland,* 86 Ariz. 288, 295, 345 P.2d 210, 215 (1959).

The right of meaningful access to the courts lies at the heart of the due process clause. *Dreher v. Sielaff,* 636 F.2d 1141, 1143 (7th Cir. 1980); *Stypmann v. City and County of San Francisco,* 557 F.2d 1338, 1343-44 (9th Cir. 1977); *see Mathews v. Eldridge,* 424 U.S. 319, 333 (1976). Implicit in the concept of *meaningful* access is the right of each party to a full and fair opportunity to litigate his particular claims. *Hardy v. Johns-Manville Sales Corp.,* 681 F.2d 334, 338 (5th Cir. 1982). Such an opportunity presupposes prior notice to the parties of the facts before the court and a realistic opportunity to be heard with regard to such facts. *See generally Goss v. Lopez,* 419 U.S. 565, 579 (1975); *Fuentes v. Shevin,* 407 U.S. 67, 80 (1972). By fabricating the facts necessary to support the predetermined result, the court denied petitioners their right of meaningful access.

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[14] Generally, an appellate court is not a trier of fact and its decision must be confined to those facts that appear in the record. *State Farm Mutual Auto Insurance Co. v. White,* 563 F.2d 971, 977 (9th Cir. 1977). If, however, a fact is capable of judicial notice, it may be considered by the appellate court. *United States v. Gonzales,* 442 F.2d 698, 707 (2d Cir.) (en banc), *cert. denied,* 404 U.S. 845 (1971); Ariz. R. Evid. 201 (f). By relying upon several "facts" neither contained in the record nor capable of judicial notice, the Arizona Supreme Court violated basic precepts regarding the scope of appellate review.

Specifically, petitioners attack the court's "factual" basis for its distinction between professionals and other defendants. The court permits professionals to set their own standards of care because

> the nature of the group and its special relationship with its clients assures society that those standards will be set with primary regard to protection of the public rather than to such considerations as increased profitability ... [T]he necessities of the marketplace permit manufacturers neither the working relationship nor the concern about the welfare of their customers that the professions generally permit and require from their practitioners.

No. 17778-PR, App. A at 11. These facts are wholly unsupported by the record and are not judicially noticeable.[15] There is nothing in the record concerning the "marketplace" or its "necessities"; no evidence of manufacturers' working relationships with their customers or any lack of care for consumers; and no evidence as to the special solicitude of professionals for their clients. Hence, there is no factual basis for the court's double standard of proof.

Further, there is no factual basis for the court's conclusion that Volkswagen acted negligently with regard to the design of the vehicle in 1957. The court stated:

> There was evidence from which the jury could find that from both an engineering and practical standpoint the

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[15] Rule 201 of the Arizona Rules of Evidence, which is identical to the corresponding federal rule, provides as follows:

> A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

Ariz. R. Evid. 201(b). Under this standard, none of the facts upon which the Arizona Supreme Court relied are capable of judicial notice.

> 1958 Volkswagen could have been designed with the battery outside the passenger compartment . . . .

App. A at 12. Although plaintiff did present some speculative testimony regarding the possibility of battery placement inside the trunk or engine compartment, there was no testimony regarding the risks and benefits associated with such an alternate design. Absent such testimony, the trier of fact, as a matter of law, could not have determined that Volkswagen was negligent for failing to adopt an alternate design without speculating. Even assuming *arguendo* that the evidence was not deficient in this regard, none of plaintiff's proof related to the time of the vehicle's design and manufacture. Although the court paid lip service to the rule that "contemporaneous forseeability of unreasonable danger is the litmus test for negligent conduct," *id.*, it ignored this glaring deficiency in plaintiff's proof only by misconstruing plaintiff's evidence as relating to the time of manufacture.

By relying upon "facts" not contained in the record, by misconstruing the evidence that plaintiff did present, and by inventing whatever additional facts were necessary to justify its conclusions, the Arizona Supreme Court deprived petitioners of property without due process of law. While this Court has not previously held that a judicial decision rendered on the basis of fabricated facts violates due process, the requirements of the Due Process Clause are flexible and its application depends upon the facts of the particular case. *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976). The various courts of appeals, on considering analogous questions, have concluded that judgments rendered on the basis of facts or issues which the losing party has had no opportunity to rebut violate due process. *See, e.g., In re Japanese Electronic Products Antitrust Litigation*, 723 F.2d 238, 304 n.55 (3rd Cir. 1983) (judgment supported by no evidence on its essential elements violates due process); *Jiminez v. Tuna Vessel "Granada"*, 652 F.2d 415, 421 (5th Cir. 1981) (finding of unseaworthiness on a basis neither pled by plaintiff nor

set out in pretrial order denied due process); *Carter v. Morehouse Parish School Board,* 441 F.2d 380, 382 (5th Cir.) (per curiam) (ruling based upon evidence which a party has not been allowed to confront or rebut violates due process), *cert. denied,* 404 U.S. 880 (1971). These cases broadly support the existence of a due process violation in the case at bar.

This conclusion logically is consistent with the purposes of the Due Process Clause. The party disadvantaged by the Court's employment of "facts" not based on any evidence has had no advance notice of the "facts" upon which the court relies and effectively has been denied the opportunity to present evidence in support of his contentions and to obtain the fair adjudication of his claims. When the highest court of a state relies upon hypothetical, fabricated facts, it denies the disadvantaged party meaningful access to the courts in violation of the due process guarantee of the Fourteenth Amendment. Only this Court has the power to rectify such a constitutional wrong.

B. *The Court's Failure to Follow its own Procedural Rules Violated Due Process.*

Rule 23(f) of the Arizona Rules of Civil Appellate Procedure (App. D) requires the Arizona Supreme Court, in its order granting review of a case, to "specify . . . the issues which are to be reviewed." In this case "[r]eview [was] granted on both issues decided by the Court of Appeals." *Rossell v. Volkswagen,* No. 17778-PR, order (Ariz. Jan 22, 1985) (App. F). Yet, in its opinion the court addressed "the remaining issues which defendant raised on appeal *and which the Court of Appeals did not address.*" No. 17778-PR, App. A at 18 (emphasis added). By considering these issues

in contravention of its own procedural rules, the court violated petitioners' due process rights. [16]

Due process requires the government to comply with existing procedural protections that regulate deprivations of life, liberty or property. *Hopt v. Utah*, 110 U.S. 574, 579 (1884). Due process means that "Government must proceed according to the 'law of the land'—that is, according to written constitutional and statutory provisions as interpreted by court decisions." *In re Winship*, 397 U.S. 358, 382 (1970) (Black, J., dissenting). "In a just society those who govern, as well as those who are governed, must obey the law." *United States v. Leon*, _____ U.S. _____, _____, 104 S. Ct. 3430, 3457 (1984) (Stevens, J., dissenting). The Fourth Circuit has declared that "when the sovereign has established rules to govern its own conduct it will be held to the self-imposed limitations on its authority, departure from which denies procedural due process of law." *Bluth v. Laird*, 435 F.2d 1065, 1071 (4th Cir. 1970); *accord, Derrickson v. Board of Education*, 703 F.2d 309, 315 (8th Cir. 1983) (state agency's failure to follow its own regulations may violate due process); *see Smith v. State of Georgia*, 684

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[16] Petitioners are aware of this Court's pronouncement that "a 'mere error of state law' is not a denial of due process." *Barclay v. Florida*, _____ U.S. _____, _____, 103 S. Ct. 3418, 3425 n.8 (1983); *Gryger v. Burke*, 334 U.S. 728, 731 (1948). These cases, however, are inapposite here. The various cases which recite this rule all rely, either directly or indirectly, upon *Gryger*. In *Gryger*, this Court did not address a situation in which the state court had failed to follow established law. Rather, the Court addressed what it considered to be an erroneous interpretation of state law. It is well settled that state courts are the ultimate authorities with regard to the interpretation of state law. *Hortonville Joint School District No. 1 v. Hortonville Educational Association*, 426 U.S. 482, 488 (1976). Hence, *Gryger* stands for the narrow proposition that a questionable interpretation of state law by a state court does not amount to a constitutional violation. *Gryger* and its progeny do not extend beyond this context and should not be applied to a situation where, as here, a state court has acted in blatant disregard of its own rules.

F.2d 729, 732 n.6 (11th Cir. 1982) (disregard for state procedures may support a due process claim).

On numerous occasions, this Court has invalidated the actions of administrative agencies on the basis of their failure to adhere to their procedural rules. *See, e.g., Service v. Dulles*, 354 U.S. 363 (1957); *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954). When assessing the conduct of officials of the Immigration and Naturalization Service, this Court stated:

> [O]ne under investigation with a view to deportation is legally entitled to insist upon the observance of rules promulgated by the Secretary pursuant to law.

Bilokumsky v. Tod, 263 U.S. 149, 155 (1923). Similarly, this Court has noted that the Interstate Commerce Commission may not

> acting in its quasi-judicial capacity ignore its own pronouncement promulgated in its quasi-legislative capacity and retroactively repeal its own enactment as to the reasonableness of the rate it has prescribed.

Arizona Grocery v. Atchison, Topeka & Santa Fe Ry. Co., 284 U.S. 370, 389 (1932). The same principle has been applied to circumscribe the powers of the Attorney General.

> [I]t is theoretically possible for the Attorney General to amend or revoke the regulation defining the Special Prosecutor's authority. But he has not done so. So long as this regulation remains in force, the Executive Branch is bound by it, and indeed the United States as the sovereign composed of the three branches is bound to respect and enforce it.

United States v. Nixon, 418 U.S. 683, 696 (1974). Finally, in *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 431-34 (1982), this principle was utilized to invalidate the action of the Illinois Fair Employment Practices Commission, a state administrative agency, on account of its failure to follow its

own procedural rules. In so doing, this court employed the language of due process. *Logan* 455 U.S. at 431-34.

Commentators have noted that the Due Process Clause is the doctrinal basis for these cases invalidating administrative action on account of procedural irregularities.[17] *See* J. Nowak, R. Rotunda & J. Young, *Constitutional Law*, ch. 15 § III at 576 (2d ed. 1983); M. Morgan, "Playing by the Rules: Due Process and Errors of State Procedural Law," 63 Wash. U.L.Q. 1 (1985); R. Berger, "Do Regulations Really Bind Regulators?" 62 N.W.U.L. Rev. 137 (1967). The Ninth Circuit has explained that

> Failure to follow such guidelines tends to cause unjust discrimination and to deny adequate notice contrary to fundamental concepts of fair play and due process.

N.L.R.B. v. Welcome-American Fertilizer Co., 443 F.2d 19, 20 (9th Cir. 1971); *accord International House v. N.L.R.B.*, 676 F.2d 906, 912 (2d Cir. 1982).

In this case, the Arizona Supreme Court refused to comply with its own rules regarding identifying the issues to be reviewed. Petitioners were prejudiced thereby. It is therefore clear that this procedural irregularity constituted a denial of due process.

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[17] The correctness of this interpretation was never in question prior to the Court's opinion in *Board of Curators v. Horowitz*, 435 U.S. 78, 92 n.8 (1978). There the Court stated that these cases "enunciate principles of federal adminstrative law rather than of constitutional law binding on the states." While the earlier cases had not expressly relied on the Due Process Clause, such reliance could reasonably be inferred from the language employed therein. Given the fact that in *Horowitz* this Court concluded that the school had followed its own rules, the statement was "nothing more than confusing dictum." *Horowitz*, 435 U.S. at 108 n.22 (Marshall J., dissenting in part). The statement is further undermined by *Logan*, in which this Court explicitly referred to the Due Process Clause in invalidating the conduct of a state administrative agency.

CONCLUSION

The decision of the Arizona Supreme Court violated petitioners' rights to due process of law and to the equal protection of the laws. The court, apparently focusing on the nature and extent of plaintiff's injury and desiring to see reparations made therefor, distorted both the facts and the law in order to reach what it considered an acceptable result. In so doing, it disregarded the constitutional safeguards to which petitioners were entitled.

For the reasons stated above, a writ of certiorari should be granted to review the decision of the Supreme Court of the State of Arizona in this case.

Respectfully submitted,

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March 14, 1986.

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APPENDICES

Appendix A

IN THE
SUPREME COURT OF THE STATE OF ARIZONA
En Banc

PHYLLIS A. ROSSELL, Guardian ad litem of JULIE ANN KENNON, a minor, Plaintiff-Appellee, vs. VOLKSWAGEN OF AMERICA, a corporation; VOLKSWAGENWERK A.G., a corporation; BLACK CORPORATIONS I through V, Defendants-Appellants.	Supreme Court No. 17778-PR Court of Appeals Div. One No. 1 CA-CIV 5589 Maricopa County No. C-313867

Appeal from The Superior Court of Maricopa County
Honorable Roger G. Strand
JUDGMENT AFFIRMED

Opinion of the Court of Appeals, Division One _____
Ariz. _____, _____ P.2d _____ (App. 1984), vacated.

Langerman, Begam, Lewis & Marks by: Richard W. Langerman Amy Langerman	Phoenix
Leonard Sacks	Encino, Ca.
Shernoff & Levine by: William M. Shernoff	Claremont, Ca.
Mallery, Stern & Warford by: Richard C. Mallery	Claremont, Ca.
Peter G. Dunn	Phoenix

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ATTORNEYS FOR APPELLANTS

ATTORNEYS FOR AMICI CURIAE
Motor Vehicle Manufacturers Association

O'Connor, Cavanagh, Anderson, Westover, Killingsworth & Beshears — Phoenix
by: Larry L. Smith

FELDMAN, Justice

This is a product liability action brought by Phyllis A. Rossell, as guardian ad litem on behalf of her daughter, Julie Ann Kennon (plaintiff), against the manufacturer and the North American distributor of Volkswagen automobiles. The defendants will be referred to collectively as "Volkswagen." The case involves the design of the battery system in the model of the Volkswagen automobile popularly known as the "Beetle" or "Bug." The jury found for the plaintiff and awarded damages in the sum of $1,500,000. The court of appeals held that the plaintiff had failed to establish a prima facie case of either negligence or proximate cause and that the trial judge had erred in denying Volkswagen's motion for judgement n.o.v. (*Rossell v. Volkswagen of America,* 1 CA-CIV 5589, Ariz. Ct.App. filed Aug. 3, 1984.) Believing that the court of appeals had incorrectly stated the applicable law with respect to both issues, we granted review. Rule 23, Ariz.R.Civ.App.P., 17A A.R.S. We have jurisdicition under Arizona Constitution art. 6, § 5(3) and A.R.S. § 12-120.24.

FACTS

We view the facts in the light most favorable to the party who prevailed at trial. *McFarlin v. Hall,* 127 Ariz. 220, 224, 619 P.2d 729, 733 (1980). This action arises from a 1970, one-vehicle accident. At the time of the accident Julie, then eleven months old, was sleeping in the front passenger seat of a 1958 Volkswagen driven by her mother. At approximately 11:00 p.m., on State Route 93, Ms. Rossell fell asleep and the vehicle drifted to the right, off the paved roadway. The sound of the car hitting a sign awakened Rossell, and she attempted to correct the path of the car, but oversteered. The car flipped over, skidded off the road and landed on its roof at the bottom of a cement culvert. The force of the accident dislodged and fractured the battery which was located inside the passenger compartment. In the seven hours it took Rossell to regain full consciousness and then extract herself and her daughter from the car, the broken battery slowly dripped sulfuric acid on Julie. The acid severely

burned her face, chest, arm, neck, part of her back and shoulder, and both hands. Since the accident Julie has undergone extensive corrective surgery but remains seriously disfigured and in need of additional surgery.

Plaintiff filed the complaint in May, 1978. She alleged four theories of recovery: negligent design of the battery system and strict liability for the defective design of the battery system, the heating system and for the propensity of the vehicle to roll over. Prior to trial, the court entered partial summary judgment for Volkswagen on the theory of strict liability for battery system design. This ruling was based on the replacement of the original battery with a larger battery which did not fit the designed restraints and which the court felt constituted "a substantial change in the condition in which the vehicle was sold." *See* Restatement (Second) of Torts 402A (b) (1965) (hereafter Restatement, § _____). The summary judgment order preserved the claim based on negligent design for placement of the battery. After the close of the plaintiff's case, the court granted a directed verdict on the issues involving heating system design and roll-over propensity. Plaintiff has not taken a cross-appeal from these rulings. Thus, the case was submitted to the jury only on the question of Volkswagen's negligence in locating the battery inside the passenger compartment.

Plaintiff argued at trial that battery placement within the passenger compartment created an unreasonable risk of harm and that alternative designs were available and practicable. In their trial motions and later motion for judgment n.o.v., Volkswagen argued that plaintiff had failed to make a prima facie case. First, it claimed that in a negligent design case the defendant must comply with the standard of a resonably prudent designer of automobiles and that

> knowledge of automobile design principles and engineering practices often is beyond the knowledge of laymen, [so that] plaintiff in a case such as this must produce expert testimony establishing the minimum

> standard of care and deviation therefrom in designing the automobile . . . .

(Defendant's Supplemental Brief at 11.) Concluding its argument, Volkswagen pointed out that plaintiff produced no testimony

> expert or otherwise, [to] describe what was expected of [or done by] a reasonable automobile designer or manufacturer in 1958 or . . . that defendants failed to meet [that] standard of care.

(*Id.* at 14.)

DID PLAINTIFF MAKE A PRIMA FACIE CASE OF NEGLIGENCE?

Legal Principles Applicable to a Negligent Design Case

The trial judge characterized Volkwagen's position as a contention that plaintiff could not prevail in the

> absence of testimony . . . from a qualified expert as opposed to simply permitting the jury to infer it, . . . that the standard of care required of a prudent manufacturer would require that the battery be placed elsewhere [or that] it was negligent . . . not to have placed it outside of the passenger compartment.

(Transcript of January 29, 1980.)

The trial judge disagreed with Volkswagen and denied the motion for judgment n.o.v. However, a majority of the court of appeals held that such evidence was required for a prima facie case. The court held

> [i]n order to establish the duty element of its negligence theory, [plaintiff] would have to provide expert witness testimony regarding the expert's opinion concerning the battery system design of ordinary careful manufacturers of automobiles in 1957. This was not done.

(Slip op. at 9.)

* * *

> The . . . state of the art can be established by expert testimony . . . Here the questions were not asked, and this aspect of duty was not established by the evidence.

(*Id.* at 12.)

We do not agree with the views expressed by the court of appeals. First, the concept of "duty, " mentioned twice by the court's majority, is irrelevant to the issues presented by this case. Duty, of course, is a necessary element in a negligence case. To satisfy that element, the court must find that the relation between plaintiff and defendant was such that it imposed upon the latter a legal obligation to use some degree of care for the protection of the former. *Coburn v. City of Tucson,* 143 Ariz. 50, 52, 691 P.2d 1078, 1080 (1984), quoting W. Prosser & W. Keeton, THE LAW OF TORTS § 53 at 356 (5th ed. 1984). Ever since *MacPherson v. Buick Motor Co.,* 217 N.Y. 382, 111 N.E. 1050 (1916) it has been accepted that even in the absence of privity of contract an automobile manufacturer is under a duty of care to those who use the automobile. *MacPherson* is still the rule in Arizona. *Crouse v. Wilbur-Ellis Co.,* 77 Ariz. 359, 366, 272 P.2d 352, 357 (1954).

Intimations about limitations of duty based on unforeseeability also appear in the majority opinion. (Slip op. at 12.) *Palsgraf v. Long Island Railway Co.,* 248 N.Y. 339, 162 N.E. 99 (1928), teaches that the duty of care does not extend to potential victims outside the zone of foreseeable risk. *Palsgraf* is the law in Arizona. *See McFarlin v. Hall, supra; West v. Cruz,* 75 Ariz. 13, 251 P.2d 311 (1952). However, a passenger in a motor vehicle is not an "unforeseeable plaintiff" as to the manufacturer of that vehicle. *Palsgraf* has no application to the present case. In short, we see no duty issue here and note that Volkswagen has raised none. Its pri-

mary argument is directed to problems connected with the standard of care applied when duty does exist. [1]

We turn, then, to the central issue presented. What type of proof must plaintiff produce in order to make a prima facie case of negligent design against a product manufacturer? What is the standard of care? In the ordinary negligence case, tried under the familiar rubric of "reasonable care," plaintiff's proof must provide facts from which the jury may conclude that defendant's behavior fell below the "reasonable man" standard. Prosser, *supra* § 31 at 169. This question is ordinarily decided without providing the jury with any direct evidence about the details of what may or may not comply with the standard of care. [2] The risk/benefit analysis involved in deciding what is reasonable care under the circumstances is generally left to the jury, *id.* at 173,

> . . . and the function of the jury in fixing the standard of reasonable conduct is so closely related to law that it amounts to a mere filling in of the details of the legal standard.

Prosser, *supra* § 37, at 238.

Thus, in the usual negligence case the jury is left to reach its own conclusion on whether defendant's conduct complied

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[1] Volkswagen has argued the lack of foreseeability of the accident as it relates to the issues of negligence and proximate cause. *See infra* at 15-21.

[2] *Cf. Moorer v. Clayton Mfg. Corp.*, 128 Ariz. 565, 627 P.2d 716 (App. 1981). *Moorer* is a strict liability, defective design case in which, as here, the court disagreed with defendant's contention that appellee (plaintiff) had not sustained its burden of proof by failing to present evidence of the product's non-conformance with the applicable standard. The court explained:

> Appellee's expert witness testified that the "nip-point" made it hazardous. The jury saw pictures of the machine and heard testimony describing how the emissions control test was performed and how the accident happened. Whether the design there satisifed the strict liability standard was a question of fact for the jury.

Id. at 568, 627 P.2d at 719.

with the legal standard of reasonable care. There need be no opinion testimony on the subject; the jury is encouraged, under proper instruction, to consider the circumstances, use its own experience and apply community standards in deciding what is or is not negligence. *Id.* at 237; § 32, at 173-74.

Volkswagen claims that negligent design cases are an exception. They contend that product manufacturers are held to an expert's standard of care, as are professionals such as lawyers, doctors and accountants. In professional malpractice cases the reasonable man standard has been replaced with the standard of "what is customary and usual in the profession." Prosser, *supra* § 32, at 189. This, of course, requires plaintiff to establish by expert testimony the usual conduct of other practitioners of defendant's profession and to prove, further, that defendant deviated from that standard.

> It has been pointed out often enough that this gives the medical profession, and also the [other professions], the privilege, *which is usually emphatically denied to other groups*, of setting their own legal standards of conduct, merely by adopting their own practices.

Id. (emphasis supplied) (citations omitted).

Should we adopt for manufacturers in negligent design cases a rule "emphatically denied to other groups" but similar to those applied to defendants in professional malpractice cases? Such a rule, of course, would require - not just permit - plaintiff to present explicit evidence of the usual conduct of other persons in the field of design by offering expert evidence of what constitutes "good design practice." Plaintiff would also be required to establish that the design adopted by the defendant deviated from such "good practice." We believe that such a rule is inappropriate.

The malpractice requirement that plaintff show the details of conduct practice by others in defendant's profession is not some special favor which the law gives to professionals who may be sued by their clients. It is, instead, a method of holding such defendants to an even higher standard of care

than that of an ordinary, prudent person. Prosser, *supra* § 32 at 185. Such a technique has not been applied in commercial settings, probably because the danger of allowing a commercial group to set its own standard of what is reasonable is not offset by professional obligations which tend to prevent the group from setting standards at a low level in order to accommodate other interests. Thus, it is the general law that industries are not permitted to establish their own standard of conduct because they may be influenced by motives of saving "time, effort or money." Prosser, *supra* § 33 at 194. Long ago, Judge Learned Hand expressed the rule in a case in which the defendant claimed that it had not been negligent in failing to put Mr. Marconi's invention on its tugboats:

> Is it then a final answer that the business had not yet generally adopted receiving sets? ... Indeed in most cases reasonable prudence is in fact common prudence; but strictly it is never its measure; a whole calling may have unduly lagged in the adoption of new and available devices. It never may set its own tests, however persuasive be its usages. Courts must in the end say what is required; there are precautions so imperative that even their universal disregard will not excuse their omission.

The T.J. Hooper, 60 F.2d 737, 740 (2d Cir. 1932). This, of course, is not to say that evidence of custom and usage is inadmissible.

> What usually is done may be evidence of what ought to be done, but what ought to be done is fixed by a standard of reasonable prudence, whether it usually is complied with or not.

Texas & Pacific Railway Co. v. Behymer, 189 U.S. 468, 470, 23 S.Ct. 622, 623 (1903) (Holmes, J.). Holmes' view has been previously considered and approved by this court. *Atchison, Topeka & Santa Fe Railway Co. v. Parr*, 96 Ariz. 13, 17, 391 P.2d 575, 578 (1964).

Volkswagen argues that case law already recognizes that in negligent design cases a manufacturer is not liable absent a showing that he failed to conform to the standard of care in design followed by other manufacturers. We do not agree. *Darner Motor Sales, Inc. v. Universal Underwriters Insurance Co.*, 140 Ariz. 383, 682 P.2d 388 (1984); *Boyce v. Brown*, 51 Ariz. 416, 77 P.2d 455 (1938); and *Riedisser v. Nelson*, 111 Ariz. 542, 534 P.2d 1052 (1975), are, for instance, cases involving professionals (insurance broker and physicians) sued by their clients or patients. *National Housing Industries, Inc. v. E.L. Jones Development Co.*, 118 Ariz. 374, 576 P.2d 1374 (App. 1978) involves the liability of a professional engineer to the assignee of its client, a developer. None of these cases consider the liability of a manufacturer for defects in mass-produced products. They do involve, instead, the liability of professionals who generally work in close relationship with their clients or patients. *Cardullo v. General Motors Corp.*, 378 F.Supp. 890 (E.D. Pa. 1974), *affirmed*, 511 F.2d 1392 (3rd Cir. 1975) is inapposite but illustrates the difference. In *Cardullo* the court held that plaintiff's case failed for lack of expert evidence that the use of a single master brake cylinder was hazardous. Proof that the alternative of a dual master cylinder system was available was not, in itself, sufficient to make a prima facie case because plaintiff was also required to prove that the use of the single system was unreasonably dangerous. That is quite different from holding that plaintiff was obligated to prove, additionally, that industry practice required the use of a dual master cylinder. The latter ruling would, of course, tend to permit commercial defendants to prevail as a matter of law if their conduct complied with a general, negligent practice prevailing in their industry. This is exactly the rule criticized in Prosser, rejected by both Justice Holmes and Judge Hand, and rejected by this court in *Parr, supra.*

In view of public policy and existing law, we decline to transform defective design cases into malpractice cases. We believe the law is best left as it is in this field. Special groups will be allowed to create their own standards of reasonably

prudent conduct only when the nature of the group and its special relationship with its clients assure society that those standards will be set with primary regard to protection of the public rather than to such considerations as increased profitability. We do not believe that automobile manufacturers fit into this category. This is no reflection upon automobile manufacturers, but merely a recognition that the necessities of the marketplace permit manufacturers neither the working relationship nor the concern about the welfare of their customers that the professions generally permit and require from their practitioners.

Therefore, in Arizona the rule in negligence cases shall continue to be that evidence of industry custom and practice is generally admissible as evidence relevant to whether defendant's conduct was reasonable under the circumstances. In determining what is reasonable care for manufacturers, the plaintiff need only prove the defendant's conduct presented a foreseeable, unreasonable risk of harm. As in all other negligence cases, the jury is permitted to decide what is reasonable from the common experience of mankind. We do not disturb the rule that in determining what is "reasonable care," expert evidence may be required in those cases in which factual issues are outside the common understanding of jurors. *Atchison, Topeka & Sante Fe Railway, Co. v. Parr*, 96 Ariz. at 18, 391 P.2d at 578-79. However, unlike most malpractice cases, there need not be explicit expert testimony establishing the standard of care and the manner in which defendant deviated from that standard. M. Udall & J. Livermore, LAW OF EVIDENCE § 25 at 43-44 (2d. ed. 1982). With these principles in mind, we now turn to a consideration of the evidence in order to determine whether plaintiff did prove a prima facie case.

Application to the Evidence

Plaintiff presented two experts, Jon McKibben, an automotive engineer, and Charles Turnbow, a safety engineer. Their testimony established that the great majority of cars on the road at the time the Beetle in question was designed

had batteries located outside the passenger compartment, usually in the engine compartment and occasionally in the luggage compartment. There was evidence from which the jury could find that from both an engineering and practical standpoint the 1958 Volkswagen could have been designed with the battery outside the passenger compartment, as was the Karmann Ghia, an upscale model which used the same chassis as the Beetle. There was further testimony that placement of the battery inside the passenger compartment was unreasonably dangerous because "batteries do fracture in crashes, not infrequently." According to McKibben,

> the degree to which the battery inside the compartment is a hazard depends to some extent on how likely it is that that battery is going to become dislodged or fractured or somehow spill acid. And certainly in roll-over type crash, a battery in that location is more likely to be a hazard to the occupants. So the fact that this model Volkswagen tends to turn over with relatively high frequency makes the battery placement inside the car a more serious hazard than it might be in other types of vehicles.

(Trial transcript of October 9, 1979, at 42; *see also* transcript of October 10, 1979 at 48-49 (Turnbow).)

Volkswagen argues that the danger of interior battery location was unforeseeable to a designer/manufacturer in the relevant time frame 1957-58. Of course, the contemporaneous foreseeability of unreasonable danger is the litmus test for negligent conduct.[3] Restatement § 289 comment b. If Volkswagen could not have foreseen that locating the battery within the passenger compartment posed an unreasonable risk of harm, then its design would not be negligent. Volkswagen argues that the only danger was Ms. Rossell's

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[3] This distinguishes a negligent design case from a strict liability design case. In the latter, the quality of the product is the issue and is determined in light of knowledge which is obtained after manufacture. *See, e.g.*, Phillips v. Kimwood Machine Co., 269 Or. 485, 8, 525 P.2d 1033, 1036 (1974).

unforeseeable use of a battery too big to fit the restraints provided in Volkswagen's design. [4] However, the jury could have found that this did not affect the design hazard involved. While the battery in question was too large to fit in the designed restraints, there was a danger of battery fracture during an accident even when batteries were properly restrained. Finally, there was testimony that various factors, including natural corrosion and deterioration, would often impair restraint systems, so that even a properly sized battery might be dislodged in a roll-over type accident.

We conclude that the plaintiff did present expert evidence that the battery design location presented a foreseeable, unreasonable risk of harm, that alternative designs were available and that they were feasible from a technological and practical standpoint. We reject Volkswagen's contention that in addition to the evidence outlined above, plaintiff was compelled to produce expert opinion evidence that the standard of "good design practice" required Volkswagen to design the car so that the battery system was located outside the passenger compartment. Unlike a malpractice case, the jury was free to reach or reject this conclusion on the basis of its own experience and knowledge of what is "reasonable,"

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[4] There was some conflict in the testimony with respect to the foreseeability of the use of over-sized replacement batteries. Plaintiff's experts claimed that the original equipment battery was unavailable in America and could not be used for replacement, so that a replacement battery would be larger than the designed system. Volkswagen counters with the argument that vehicles manufactured for the export market, particularly in America, were designed for and equipped with a larger battery. This difficult factual issue is not as important as it might seem, at least to our review, because there was testimony from plaintiff's experts that replacement on most Volkswagens was with a battery even larger than either of those. This larger battery would fit neither the domestic nor the export battery restraint systems of the Beetle. It was, in fact, this larger battery that the Rossell vehicle was using at the time of the accident.

with the assistance of expert opinion describing only the dangers, hazards and factors of design involved. [5]

PROXIMATE CAUSE

Volkswagen argues that "foreseeability must be established as an element of proximate cause" (Defendant's Supplemental Brief at 21), and that the real proximate cause of plaintiff's injury in the present case was the intervening, superseding negligence of the unknown person that installed a battery too large to be contained by the restraint system of Rossell's car. (*Id.* at 8.) The court of appeals agreed. (Slip op. at 12-16.) Since the trial judge did instruct the jury on the proximate cause issue, all questions of fact on that issue have been resolved in plaintiff's favor. [6]

An intervening cause is one which intervenes between defendant's negligent act and the final result and is a necessary component in bringing about that result. Prosser, *supra* § 44 at 301, *et seq.* Given the complexity of life, there is little that can be attributed to any single act, and the law does not relieve a defendant from liability simply because of the intervening act of a third person. It is only when the intervening act is considered superseding cause that the orginal actor is relieved of liability for his negligence. *Id.* The test for a superseding cause is simpler to articulate than it is

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[5] We need not concern ourselves with whether any of these issues could have been submitted to the jury without expert evidence. The evidence was presented; there is no need to go beyond that.

[6] In part, the instruction read as follows:

> Not all intervening causes are superseding causes. A superseding cause is an intervening cause which by its nature becomes the proximate cause of the injury and relieves the defendant of any liability for said injury.
>
> For an intervening cause to be a superseding cause it must be a cause which could not have been reasonably foreseen or anticipated by the defendant.

Defendant has not claimed that the trial court erred in this instruction: As will be seen, *infra* at 16-17, the instruction was probably more favorable to defendant's position than is justified by the current state of the law.

to apply and has been a frequent source of litigation and confusion.

> In the final analysis, the question of superseding cause has been determined by asking whether the intervention of the later cause is a significant part of the risk involved in defendant's conduct, or so reasonably connected with it that the responsibility [of defendant] should not be terminated. It is therefore said that the defendant is to be held liable if, but only if, the intervening cause is "foreseeable."
>
> But here, ... this overworked and undefined word covers a multitude of sins. It is at least clear that in many cases recovery has been allowed where the intervening cause was not one which any reasonable actor could be expected to anticipate or have in mind, but it is regarded as 'normal' to the situation which the actor has created. In other words, although the theory of the cases is one of foreseeability, a considerable element of hindsight may have entered into its practical application.

Id. at 302-03; see also Restatement, § 435 comment d.

Thus, the text writers and commentators generally acknowledge that an intervening force becomes a superseding cause only when its operation was both unforeseeable and when with the benefit of "hindsight" it may be described as abnormal or extraordinary. These principles have been acknowledged in Arizona whenever the issues have been raised. *See, e.g., Ontiveros v. Borak,* 136 Ariz. 500, 506, 667, P.2d 200, 206 (1983) (superseding cause is one which is unforeseeable and, viewed through hindsight, extraordinary); *Parness v. City of Tempe,* 123 Ariz. 460, 464, 600 P.2d 764, 768 (App. 1979) (where the intervening negligent or intentional act was within the scope of the original risk created by defendant's negligence, it is not a superseding cause); *Central Alarm of Tucson v. Ganem,* 116 Ariz. 74, 567 P.2d 1203 (App. 1977) (burglar alarm company which left a key to deactivate the alarm system where it was accessible to unau-

thorized persons is not relieved of liability by intervening criminal acts of a third party).

These cases encompass the rule that the scope of the risk created by the negligence of the original actor may include the foreseeable negligent or criminal conduct of others. *Hemet Dodge Corp. v. Gryder,* 23 Ariz. App. 523, 534 P.2d 454 (1975) (Installer of incorrect radiator cap is liable notwithstanding the intervening act of the driver who negligently removed the cap from an overheated engine in the presence of others, including the plaintiff.); *Brand v. J.H. Rose Trucking Co.,* 102 Ariz. 201, 427 P.2d 519 (1967); Prosser, *supra* § 44 at 304. The Restatement indicates that the intervening negligence of a third person is not a superseding cause if the original actor's conduct was a substantial factor in bringing about the result and if "a reasonable man knowing the situation *existing when the act of the third person was done* would not regard it as highly extraordinary that the third person had so acted .... " Restatement § 447(b) (emphasis supplied); *Serrano v. Kenneth A. Ethridge Contracting Co.,* 2 Ariz. App. 473, 409 P.2d 757 (1966); *see also* Restatement §§ 435 and 442 (b).

Thus, defendant is not relieved of liability simply because he could not have foreseen the manner in which the accident occurred, including the negligent intervention of third parties. *Schnyder v. Empire Metals, Inc.,* 136 Ariz. 428, 430, 666 P.2d 528, 530 (App. 1983). The question is whether the plaintiff was in the foreseeable range of defendant's negligent conduct (designing the vehicle with a battery located inside the driver's compartment) and whether the injury resulted from the recognizable risk that made that conduct negligent. *Id.*

With these principles in mind we turn again to the evidence to determine whether the trial court was required to rule as a matter of law that defendant's negligence was superseded by the intervening acts of the battery installer and the driver. The record indicates that the vehicle was made with a battery which foreseeably would need replacement ev-

ery two to four years. According to one of plaintiff's experts, the car was designed with

> . . . a battery size and battery cover size which was almost impossible to fit in terms of an available [replacement] battery here in the United States or into which it was almost impossible to fit an available battery size.

(Trial transcript of October 4, 1979 at 113 (McKibben).)

Defendant's version of the facts was that properly sized replacement batteries were available and it was unforeseeable that properly sized replacement batteries would not be used. Nevertheless, there was evidence that the risk in locating the battery inside the passenger compartment was raised by the foreseeable non-use of the restraint system. McKibben testified:

> I believe I mentioned before the fact that hold-down systems tend to deteriorate with the passage of time. They tend to corrode. They tend to become unusable so that when batteries are replaced, it is often not possible to reuse the previous restraint system or hold-down system. And obviously from my own personal experience, whoever installs the battery under those circumstances does not go out and seek additional or alternate hold-down parts . . . to hold the battery back down.
>
> Secondly, in this particular case, assuming that this vehicle came with a 66-amp-hour battery of dimensions described in the Volkswagen's drawings that I have reviewed, I don't think that the cover and that . . . the standard hold-down system would be usable and on a readily obtainable battery. It just flat won't fit on a battery that someone would be able to go down and buy at a typical battery outlet.

(Trial transcript of October 9, 1979 at 44.)

In the final analysis, then, the intervening act of some third person consisted of installing a battery of *any* size without using the designed restraint system. In the present case the failure to use the restraint system may have been

the result of using an oversized battery, of deterioration of the system through corrosion, of the installer's negligence, or of another cause. There was evidence that properly restrained batteries may break loose from the tie down system in a roll-over accident, so that design must also account for the danger of a properly restrained battery coming loose because of the nature of the accident. There was even further evidence that batteries that did not come loose could be fractured in accidents. The jury could find, in other words, that the hazard created by Volkswagen's location of the battery in the passenger compartment was that the battery, when fractured for any one of a variety of reasons, would expose occupants to the danger of burns from sulfuric acid. We do not believe that it can be said as a matter of law that the fracture of a battery resulting in burns to someone within the passenger compartment was not attributable to the recognizable risk. *Schnyder v. Empire Metals, supra.* The injury was within the scope of the risk created by defendant's original design; whether the exact manner in which the accident occurred was foreseeable to defendant is not the determining factor. *Id.;* Restatement § 449. [7]

We hold that plaintiff did make a prima facie case of negligence and proximate cause. The trial court did not err in failing to direct a verdict or grant judgment n.o.v. Because we must vacate the court of appeals opinion, we now turn to the remaining issues which defendant raised on appeal and which the court of appeals did not address.

DID THE TRIAL COURT ERR BY ALLOWING PLAINTIFF TO REFER TO THE BEETLE'S PROPENSITIES TO ROLL-OVER AND TO INTRODUCE CARBON

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[7] *Cf:* Peck v. Ford Motor Co., 603 F.2d 1240 (7th Cir. 1979) (applying Indiana law), the case on which Volkswagen relies most heavily. *Peck* may well be a case in which defendant's tort had "spent its force." *Id.* at 1244. Indiana law on superseding cause is so substantially different from Arizona's that *Peck* has no application to the case at hand. Compare for example, Conder v. Hull Lift Truck, Inc., 435 N.E.2d 10, 14-15 (Ind. 1982) with Ontiveros v. Borak, 136 Ariz. 500, 506, 667 P.2d 200, 206 (1983).

MONOXIDE INTO THE PASSENGER COMPARTMENT?

At the end of plaintiff's case Volkswagen moved for directed verdicts on plaintiff's theories pertaining to strict liability for the Beetle's propensities to roll over, strict liability for the propensity to introduce carbon monoxide into the passenger compartment, and negligent desing of the battery system. The trial court granted the motion only with respect to the two strict liability claims. Volkswagen argues that plaintiff's persistent references, after the directed verdicts, to the Beetles' roll-over and carbon monoxide problems denied it a fair trial. It contends that the many examples of plaintiff's "continu[ing] to try issues removed by the directed verdict" (Defendant's Opening Brief to the Court of Appeals at 43) include such questions as the following, posed by plaintiff's counsel to one of defendant's expert witnesses:

> If a vehicle had a propensity to roll-over with a fairly high frequency, do you think that ought to be taken into account in designing the placement of the battery in that vehicle and the retention system?

The grant of a directed verdict does not cleanse the record of facts adduced to support the legal theories taken from the jury. Evidence which fails to establish the theory at which it was aimed may, nevertheless, be considered on any other issue to which it is relevant. The trial court responded to defendant's objections by ruling that carbon monoxide was removed from the case with respect to the issue of defective heater design, but not with respect to its possible soporific effect on the car's occupants. The court also ruled that the evidence of roll-over propensity was still admissible because it related to the question of whether the interior location of the battery system was negligent. Both rulings were correct. Plaintiff could argue all evidence relevant to her theory of negligent battery design, whether she originally brought the case under that theory alone or under several theories, some of which were later dismissed. Directed verdicts on some

theories do not change what is relevant to remaining theories. *See, e.g., Brady v. Melody Homes Manufacturer,* 121 Ariz. 253, 589 P.2d 896 (App. 1979).

Finally, the court explicitly told the jury during plaintiff's closing argument that two of the three issues had been removed from the case, that battery location was the only issue remaining and that evidence regarding roll-over danger and carbon monoxide were to be considered only if relevant on the issue of battery location and the conduct of plaintiff and her mother. The jury instructions given later repeated this. We find no error.

JURY INSTRUCTIONS

Volkswagen claims to be entitled to a new trial because Instructions Nos. 14 and 22 pertained to theories of law not supported by the facts, and invited speculation as to abstract circumstances. Instruction No. 14 given by the trial court was as follows:

> You are instructed that the negligence, if any, of Phyllis Rossell may not be imputed to Julie Ann Kennon.

Volkswagen argues that it was never its theory that Ms. Rossell's action could or should be 'imputed' to Julie, but only that Ms. Rossell's actions were the sole proximate cause of Julie's injuries. It argues that instruction on imputation, combined with the instruction on superseding cause, could only have rendered the jurors "hopelessly confused." We disagree.

Jury instructions should inform the jury of the law that they are to apply to the facts. *Noland v. Wooten,* 102 Ariz. 192, 194, 427 P.2d 143, 145 (1967). They should also limit consideration to those issues which the jury is to determine. *Embrey v. Galentine,* 76 N.M. 719, 418 P.2d 62, 64 (1966). Here the instruction on imputation was clearly intended to

limit the jury's attention to the issues properly before it.[8] Defendant's reliance on *Noland v. Wootan, supra,* is misplaced. In that case we found the jury instruction to be reversible error because it had two mutually exclusive meanings; because the jury could have applied the wrong meaning, we held that the instruction was misleading and prejudicial. We cannot come to the same conclusion in this case. Instructions prohibiting speculation about imputed negligence and defining proximate cause are not mutually exclusive. The jury could have and should have applied both instructions.

Instruction No. 22 given by the trial court was as follows:

> If you decide for the plaintiff on the question of liability, you must then fix the amount of money which will reasonably and fairly compensate for any of the following elements of damages proved by the evidence to have resulted from the defendant's negligence:
>
> * * *
>
> 4. *Any decrease in earning power or capacity in the future.*
>
> Whether any of these elements of damages has been proved by the evidence is for you to determine.

(emphasis supplied). Volkswagen argues that the instruction is reversible error for two reasons. First, because it claims: "[i]f a plaintiff can work *at all, an award for total loss of earning capacity is improper.*"

(Emphasis in original.) However, the instruction in question does not require that the jury make an award for "total loss of earning capacity," only for "any decrease" which is proved.

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[8] Because plaintiff was eleven months old at the time of the accident, contributory negligence was of course precluded as a defense. The reasonable foreseeability of the mother's conduct was relevant to the issue of proximate cause.

Second, Volkswagen claims that the trial court erred in giving Instruction No. 22 because there was no evidence to support an award for decreased earning capacity. We disagree because there was evidence of decreased earning capacity. That evidence consisted of the jurors' view of the plaintiff, the pictures of the plaintiff and the medical testimony about the permanent, disfiguring injuries sustained by the plaintiff. There is a difference between loss of earnings — not an issue in this case — as an item of special damages and decrease of earning capacity as an item of general damages. *Mandelbaum v. Knutson*, 11 Ariz. App. 148, 149, 462 P.2d 841, 844 (1969). To sustain an award for the former, the plaintiff must produce evidence of specific losses which are ordinarily reduced to present value. *Id.* To sustain an award for the latter, the plaintiff must establish only the fact of diminished capacity and its permanence. *Atchison, Topeka & Santa Fe Ry. Co. v. Parr, supra.* The photographs of plaintiff's scars create a jury question with regard to whether her disfiguring injuries would affect plaintiff's earning capacity. It is certain that plaintiff's ability to perform some jobs has not been affected and her ability to perform others has been diminished or destroyed. No doubt some interviewers will be able to overlook the scars and some will not, no matter how hard they try. Perhaps plaintiff will overcome the impediment, perhaps not. Such questions are properly left to the jury.

There was no error in giving either instruction.

DID THE TRIAL COURT ABUSE ITS DISCRETION BY PERMITTING ILLUSTRATIVE EVIDENCE INTO THE JURY ROOM?

Volkswagen first complains that components of various Beetle battery systems, admitted for illustrative purposes only, should not have been allowed into the jury room during the jury's deliberations. The problem to be avoided is allowing the jury to conduct its own experiments.

> In attempting to distinguish between proper and improper use of tangible exhibits, the most commonly

> drawn distinction is between experiments which constitute merely a closer scrutiny of the exhibit and experiments which go 'beyond the lines of evidence' introduced in court and thus constitute the introduction of new evidence in the jury room.

McCormick on Evidence § 217 at 541 (E. Cleary, ed., 2d ed. 1972). The decision as to what testimonial exhibits are to be permitted into the jury room is within the trial court's discretion. *Falchar v. St. Luke's Hospital Medical Center,* 19 Ariz. App. 247, 252, 506 P.2d 287, 292 (1973); *McCormick, supra.* There is no indication that the jury did use or could have used the exhibits for any particular experimental purpose beyond those presented in the evidence. The components, therefore, were of the type useful for "closer scrutiny." There was no abuse of discretion in sending them to the jury room.

Defendant also complains the trial court erred by admitting four large charts concerning the effects on humans of certain levels of carbon monoxide. The charts were prepared by Mr. Turnbow. Three of the charts contained summaries of data from clinical studies made by others; the fourth summarized Turnbow's opinions. Volkswagen argues that because they were not the original treatises the first three charts do not fit into the "learned treatise" hearsay exception of Rule 803(18), Ariz.R.Evid. 17A A.R.S., and were therefore inadmissible. Furthermore, even if the exception was applicable, Volkswagen argues that Rule 803(18) permits admissible statements from treatises only to be read into the record, not received physically into evidence.

The learned treatise exception to the hearsay rule stems from three independent guarantees of trustworthiness of such works. Treatises admissible under Rule 803(18) are written impartially in favor of truth as the authors see it; they are subject to careful professional scrutiny for inaccuracies by the author's colleagues; and the author has an interest in its accuracy because his or her reputation is at stake. 6 J. Wigmore, EVIDENCE § 1692 (Chadbourn rev.

1976). The purpose served by limiting the jury's exposure to an oral reading at the time the expert is being examined is to avoid the jurors' possible misunderstanding and misuse of the technical treatise when it is later examined in the jury room with no one present to explain or be cross-examined. 4 J. Weinstein & M. Berger, WEINSTEIN'S EVIDENCE § 803(18)[01].

The dangers at which the rule's restrictions are aimed, were not present in this case. The charts did not purport to be excerpts from the treatises, but only the opinions of the witness as to what the articles established. When the trial judge admitted the charts, he specifically admonished the jury that they should not regard the charts as substantive evidence of the material contained in them, but only as illustrative of the witness' opinions as to the effects of carbon monoxide. The limitation of the rule to oral recitation of the text of a learned treatise was not violated and it was within the trial court's discretion to allow the charts into the jury room.

Finally, defendants argue that they are entitled to a new trial because the verdict is not justified by the evidence and is contrary to the law. This contention is disposed of by our previous discussion.

The opinion of the court of appeals is vacated. The judgment is affirmed.

STANLEY G. FELDMAN, Justice

CONCURRING:

WILLIAM A. HOLOHAN, Chief Justice

FRANK X. GORDON, JR., Vice Chief Justice

Appendix B
SUPREME COURT
STATE OF ARIZONA

18 December 1985

RE: ROSSELL vs. VOLKSWAGEN OF AMERICA
Supreme Court No. 17778-PR
Court of Appeals No. 1 CA-CIV 5589
Maricopa County No. C-313867

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on December 17, 1985, in regard to the above-referenced cause:

"ORDERED: Motion for Reconsideration = DENIED."

Mandate enclosed.

DAVID R. COLE, Clerk

To: Richard W. Langerman, Esq., Langerman, Begam, Lewis & Marks
William M. Shernoff, Esq., Shernoff & Levine
Richard C. Mallery, Esq., Mallery, Stern & Warford
Leonard Sacks, Esq.
Peter G. Dunn, Esq.
Philip E. von Ammon, Esq., Ruth V. McGregor, Esq., and Nancy L. Rowen, Esq., Fennemore, Craig, von Ammon & Udall
Larry L. Smith, Esq., O'Connor, Cavanagh, Anderson, Westover, Killingsworth & Beshears

pgk

SUPREME COURT
STATE OF ARIZONA

18 December 1985

Vivian Kringle, Clerk
Maricopa County Superior Court
201 West Jefferson
Phoenix, Arizona 85003

RE: PHYLLIS ROSSELL vs. VOLKSWAGEN OF AMERICA
Supreme Court No. 17778-PR
Court of Appeals No. 1 CA-CIV 5589
Maricopa County No. C-313867

Dear Ms. Kringle:

Enclosed is the Mandate together with a copy of the Opinion handed down by this Court in the above-referenced matter. We are also returning your record as follows:

See attached sheet

Please sign the enclosed copy of this letter and return it to this office as our receipt.

Very truly yours,

DAVID R. COLE, Clerk

By /s/ PAMELA KEMMERLING
Deputy Clerk

Enclosures

cc: Richard W. Langerman, Esq., Langerman, Begam, Lewis & Marks
William M. Shernoff, Esq., Shernoff & Levine
Richard C. Mallery, Esq., Mallery, Stern & Warford
Leonard Sacks, Esq.
Peter G. Dunn, Esq.
Philip E. von Ammon, Esq., Ruther V. McGregor, Esq., and Nancy L. Rowen, Esq., Fennemore, Craig,

von Ammon & Udall
Larry L. Smith, Esq., O'Connor, Cavanagh, Anderson, Westover, Killingsworth & Beshears
Glen D. Clark, Court of Appeals, Division One

Remaining Record from Co±A - *Maricopa County Superior Court:*

Instruments (5 parts); Minute Entries: Exhibit List; Orig RT's - 24 vols (9/13/79; 9/17/79; 9/24/79; 9/26/79; 9/27/79; 10/1/79; 10/3/79; 10/4/79; 10/9/79; 10/10/79; 10/11/79; 10/17/79; 10/18/79; 10/23/79 [10:00 a.m.]; 10/23/79 [1:45 p.m.]; 10/24/79; 10/29/79; 10/30/79; 11/7/79 [a.m.]; 11/7/79 [p.m.]; 11/8/79; 11/13/79; 11/14/79; 11/16/79; 1/29/80); Depositions - 40 vols (Albers [9/19/79]; Albers [9/20/79]; Albers [10/25/79]; Albers 10/28/79]; Bergquist; Clark; Dusek; Joseph Thomas Gautreau; Joseph Albert Gautreau; Harden; Frank N. Hartong; Pauline Hartung; Heitzman; Inman [7/13/76]; Inman 7/28/76]; Johnson [9/18/79]; Johnson [9/19/79]; Kennan; Larson; McKibben [9/12/77]; McKibben [Vol II]; McKibben [Vol III]; Mitchell; Pierson; Pyatt; Reely; Rossell [11/11/75]; Rossell [5/12/77]; Rossell [8/11/78]; Rossell [9/14/79]; Severy; Betty Short; Rickey D. Short; Virgil C. Short (2); Stevenson; Turnbow [8/24/79]; Turnbow [Vol II]; Wohl; Zarem); Exhibits (4 large charts & 1 red box in Exhibit Room [Pltf Exh Nos. 2-5, 11-18, 24-27, 30-32, 33, 42-48, 48A, 48B, 49-59, 61, 62, 64, 69-75, 85-89, 102A, 106B*, 114, 116, 117, 119-121, 121A, 122-124, 126; Def Exh Nos. 6-10, 34, 81-83, 90, 92, 93, 96-99, 101, 118, 125; Pltf Exh No. 127]); *Court of Appeals:* Instruments eh

Appendix C

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

PHYLLIS A. ROSSELL, Guardian ad litem of JULIE ANN KENNON, a minor, Plaintiff-Apellee, v. VOLKSWAGEN OF AMERICA, a corporation; VOLKSWAGENWERK, A.G., a corporation; BLACK CORPORATIONS I through V, Defendants-Appellants.	1 CA-CIV 5589 Department D O P I N I O N

Appeal from the Superior Court of Maricopa County
Cause No. C-313867
The Honorable Roger G. Strand, Judge
REVERSED; REMANDED

Shernoff, Wild, Lipsky & Batchelor By Gary V. Wild	Claremont, California
Mallery, Stern & Wulford By Richard C. Mallery	Claremont, California
Peter G. Dunn Attorneys for Appellee	Phoenix, Arizona
Fennemore, Craig, von Ammon, Udall & Powers, P.C. By Philip E. von Ammon, Ruth V. McGregor and Nancy L. Rowen Attorneys for Appellants	Phoenix, Arizona

EUBANK, Judge

This is a negligent design of a 1958 Volkswagen battery system case. The battery system of the vehicle involves the battery, its location within the vehicle, the battery cover, and the battery restraint.

Following the trial, the jury returned its verdict in favor of appellee Julie Ann Kennon against appellant Volkswagen for $1,500,000. Volkswagen moved for a judgment notwithstanding the verdict, or, in the alternative, a new trial. Both motions were denied and Volkswagen has appealed to this court from the judgment and the denial of both motions.

The facts are that Phyllis Rossell, the mother and guardian ad litem of Julie Ann Kennon (11 months old at the time of the accident) was driving her own mother's 1958 Volkswagen Type I Sedan, known as a "Bug" or "Beetle", from Riviera, Arizona to Phoenix, on October 16, 1970. (The vehicle had been purchased approximately two months earlier as a used car and the motor had been replaced in 1968). Following a full day's work at Bechtel, Phyllis placed Julie in the right hand passenger seat and left her mobile home between 8:00 and 8:30 p.m. She stopped at Bullhead City for dinner and then continued her trip to Phoenix through Kingman then by State Route 93. At approximately 11:00 p.m., at a point north of Wikieup, on State Route 93, Phyllis either fell asleep or became unconscious and the vehicle drifted to the right off of the paved roadway. It hit a sign and the noise aroused Phyllis. In attempting to gain control of the vehicle, she rolled it over on the road. It then left the road and landed on its top in a wash. Phyllis and Julie remained in the vehicle for seven hours. During this period of time Phyllis was in both unconscious and conscious states. When she finally gained full consciousness, Phyllis exited the vehicle and removed Julie. She then obtained assistance from a passing motorist.

Julie was severly burned by battery acid as a result of the accident. During the years since, she has undergone extensive corrective surgery.

When Phyllis initially filed this case on behalf of Julie against Volkswagen, it was based on four theories of recovery: strict liability resulting from the design of the battery system, negligent design and placement of the battery, strict liability for the design of the heating system, and strict liability for the propensity of a Volkswagen to roll over. Prior to trial, the court granted Volkswagen partial summary judgment on the issue of strict liability as it pertains to the design placement of the car battery because "the substitution of the larger battery for the smaller battery designed for use in the subject vehicle was a substantial change in the condition in which the vehicle was sold." The partial summary judgment also preserved Julie's right to proceed on her theory of negligence regarding the design and placement of the smaller car battery, which allegedly and foreseeably could be changed by the consumer to a larger battery. When plaintiff rested her case, the trial judge granted Volkswagen's motions for directed verdict on the remaining strict liability theories relating to the roll-over propensity and the design of the heater for the introduction of carbon monoxide into the passenger compartment. Thus, plaintiff's only remaining theory for recovery, when the case was submitted to the jury, was the alleged negligent design of the Volkswagen by locating the battery under the rear passenger seat. No cross-appeal was taken by Phyllis from the summary judgment or directed verdicts. On appeal Volkswagen raises three issues for our consideration.

I. SHOULD VOLKSWAGEN HAVE BEEN GRANTED A DIRECTED VERDICT, AND LATER A JUDGMENT N.O.V., ON THE ISSUE OF NEGLIGENT DESIGN BECAUSE APPELLEE FAILED TO ESTABLISH A PRIMA FACIE CASE OF NEGLIGENCE?

II. IS VOLKSWAGEN ENTITLED TO A NEW TRIAL BECAUSE OF IRREGULARITIES IN THE PROCEEDINGS OF THE TRIAL COURT, AND BECAUSE THE TRIAL COURT'S ABUSES OF DISCRETION DEPRIVED VOLKSWAGEN OF A FAIR TRIAL?

III. IS VOLKSWAGEN ENTITLED TO A NEW TRIAL BECAUSE THE VERDICT IS NOT JUSTIFIED BY THE EVIDENCE AND IS CONTRARY TO THE LAW?

Taking the first issue, that appellee failed to establish a prima facie case of negligent design, Volkswagen contends, in part, that its motion for judgment N.O.V. should have been granted since appellee failed to establish a prima facie case of negligence because she failed to present any evidence as to Volkswagen's standard of care and its departure therefrom. It argues that appellee failed to produce expert witness testimony which would establish the standard of care of a motor vehicle manufacturer in 1958 [1] (and Volkswagen's deviation from that standard of care) and second, that plaintiff failed to show that the injuries which she suffered twelve years after the car was manufactured should have been foreseeable by Volkswagen.

We begin by considering the first question — did plaintiff establish through expert witness testimony the applicable standard of care owed by a motor vehicle manufacturer in 1958. The trial court instructed the jury on the standard as follows:

> The standard of care of a manufacturer in designing a product is that of an expert in regard to the product he sells. A manufacturer is negligent if he fails to act as an ordinary careful manufacturer would act under the circumstances. Thus, if better testing or design was available and would have eliminated an unreasonable danger, the manufacturer is expected to have known and used that method as a matter of due care.

This instruction substantially complies with our opinion in *Brady v. Melody Homes Manufacturer,* 121 Ariz. 253, 589 P.2d 896 (App. 1978).

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[1] Volkswagen would refer us back to 1957 because the VW, although manufactured in 1958, was designed in 1957. Plaintiff has used 1958 throughout her brief. It is the year that the vehicle was manufactured.

The dispute between the parties concerns their respective contentions with regard to whether expert witness testimony is needed to establish the appropriate standard of care. Because the "standard of care of the manufacturer is that of an expert with regard to the product he sells," *Brady*, 121 Ariz. at 259, 589 P.2d at 902, Volkswagen contends that the appropriate standard of care in negligent design cases must always be proved through expert witness testimony. Plaintiff, on the other hand, contends that the necessity of establishing the standard of care through expert witness testimony is only applicable to cases involving professional neligence, such as medical malpractice. Both arguments in our opinion miss the mark.

The resolution of this question depends upon whether, without the benefit of expert witness testimony, a jury within its common understanding, *Atchison, Topeka and Santa Fe R.R. Co. v. Parr*, 96 Ariz. 13, 18, 391 P.2d 575, 578-79 (1964), could conclude that in the exercise of ordinary care, a safer design was feasible. In *Parr*, an employee was injured while moving pipe by a crane from a railroad car to a truck. The operator could not see out of the compartment while operating the crane. The court held that the jury could conclude, without the benefit of expert testimony, that the railroad was negligent in providing equipment with restricted visibility. Similarly, in *Brown v. Clark Equipment Co.*, 618 P.2d 267 (Hawaii 1980), the court held that the question of whether a large blind spot hindering the vision of an operator of a 35-ton shovel loader could have been reduced or corrected by outside rear view mirrors, was sufficiently within the common understanding of a jury and that no expert witness testimony was required.

On the other hand, expert witness testimony was held to be essential in a case involving the alleged defective design of the braking system and interior design of a commercial bus. *McClellan v. Chicago Transit Auth.*, 34 Ill. App.3d 151, 340 N.E.2d 61 (1975). The feasibility of an elevator toe guard was found to be a technical matter and not within the jury's

experience in *Westinghouse Electric Corp. v. Nutt,* 407 A2d 606 (D.C. Ct. App. 1979).

Thus, the determination of whether expert witness testimony is necessary to prove a manufacturer's negligence must be determined on a case-by-case basis depending on the circumstances involved. Therefore, neither of the broad contentions of the parties are correct. Applying the test set forth in *Parr,* we conclude that the issue of whether Volkswagen's placement of the battery inside the passenger compartment of the 1958 vehicle and the design of the tie-down system in 1957 violated the applicable standard of care is sufficiently a technical design matter that expert witness testimony is required. *See* Rule 702, Arizona Rules of Evidence; 3 J. Weinstein & M. Berger, Weinstein's Evidence para. 702 (1982).

Turning now to the question whether there is expert witness evidence of the manufacturer's design standard of care in 1958 in the record, we note that appellee maintains that such evidence was unnecessary. In appellee's brief she states:

> Thus, the standards exercised by the automobile industry in 1958 do not establish the standard of care required of a manufacturer in 1958. As indicated, it is some benefit to the fact finder, but in the end the fact finder must decide based upon common notions of prudence. Therefore, whether there is or there is not direct evidence of industry standards in 1958 is totally immaterial to a decision as to whether the 1958 Type I Sedan was negligently designed and created an unreasonable risk of harm.

We disagree. In *Brady v. Melody Homes Manufacturer,* 121 Ariz. 253, 589 P.2d 896 (App. 1978) we attempted to draw the distinction between the proof necessary under a strict liability case theory and one based on a negligence theory. After discussing strict libility principles involving the manufacturer of a mobile home and the incorporation therein of pop-out windows, we held that the incorporation of smoke detectors was a negligence issue:

> We can say as a matter of law, however, that a reasonable consumer in 1964 would not have contemplated that a mobile home manufactured in 1964 would contain smoke detectors. This omission, in our opinion, does not fall within the definition of "defect" for strict liability purposes, and therefore must be judged upon negligence principles — the standard being that of a reasonably prudent manufacturer. In this context, Melody Homes' "state of the art" defense[4] is viable. *Maxted v. Pacific Car & Foundry Co.*, 527 P.2d 832 (Wyo. 1974). (Footnote omitted).

121 Ariz. at 260, 589 P.2d at 903. Our supreme court in *Rocky Mountain Fire and Casualty Co. v. Biddulph Oldsmobile*, 131 Ariz. 289, 640 P.2d 851 (1982), in discussing the different proof required under a strict liabiity theory and a negligence theory allegation said:

> Appellant alleges that appellees were negligent. The pleadings are not specific, but presumably appellant contends that Winnebago and Chrysler were negligent in the design and/or manufacture of the motor home and Biddulph was negligent in repairing the motor home. "In Arizona, to successfully maintain an action for the tort of negligence, the plaintiff must show that the defendant had a duty to protect the plaintiff from the injury of which he complains, that defendant failed to perform that duty and that such failure proximately caused the plaintiff's injury." *Arizona Public Service Co. v. Brittain*, 107 Ariz. 278, 280, 486 P.2d 176, 178 (1971).
>
> In this instance Winnebago and Chrysler had a duty to design and manufacture with due care so that the resulting product did not ignite without cause. Biddulph had a duty to perform repairs in a reasonably competent manner. The fire caused injury to appellant resulting in damages. Appellant, however, is unable to establish a prima facie case of negligence to get to the jury because of the lack of any concrete evidence of which party breached its duty . . .

131 Ariz. at 293-94, 640 P.2d at 855-56. Thus, as the trial court instructed the jury, *supra*, the standard of care is that a manufacturer is negligent if it fails to act as an ordinary careful manufacturer would act under the circumstances. The circumstances here involve the design of the battery system in 1957 for the 1958 model Volkswagen. In order to establish the duty element of its negligence theory, appellee would have to provide expert witness testimony regarding the expert's opinion concerning the battery system design of ordinary careful manufacturers of automobiles in 1957. This was not done. Mr. McKibben, appellee's expert witness testified, that in his opinion the design of a vehicle which calls for the placement of a battery inside of the passenger compartment in the manner of this 1958 Volkswagen constituted an unreasonably dangerous condition. He did not testify regarding battery system design standards of automobile manufacturers in 1957. This lack of testimony is well illustrated by the following colloguy between the trial court and counsel at the post-trial motions hearing on January 29, 1980:

> THE COURT: Let's assume that availability of the state of the art to have done it differently is not an issue and no testimony was needed. I think that Mrs. McGregor [attorney for Volkswagen] is saying, among several things, but that it's possible that someone could have been qualified and gotten on the stand, perhaps McKibben [appellee's expert witness] would have been permitted to give such testimony, I don't know. But I think she's saying that nobody said that it was a departure from the standard of care imposed upon reasonable automobile manufacturers in 1957 not to have placed the battery either in the forward compartment or the engine compartment. In other words, I think it's her position that is lacking and it is essential. I think that McKibben said it is an unreasonably dangerous, and I'm not sure now whether it's condition or design, and I don't know whether it's significant, to have it where it is. That's simply his opinion coming from the stand without being asked whether that was something a designer knew or didn't know.

I think it's also sufficiently in the record that the manufacturer knew of the danger of caustic battery acid. There's no doubt about that. They knew that it was a dangerous substance and what it would do to an individual.

They — but unless I am mistaken, it is the absence of testimony saying from a — from a qualified expert as opposed to simply permitting the jury to infer it, that there was no expert testimony saying that the standard of care required of a prudent manufacturer would require that the battery be placed elsewhere. In other words, knowing that it was dangerous was not enough. But they — it also needs to be established that because of that, and because of all of the other aspects involved in designing a car, it was negligent or a departure from the appropriate standard of care not to have placed it outside of the passenger compartment. I don't know if that's exactly what she's saying. But assuming it is for the moment, maybe you could confirm, is that what you are saying?

MRS. McGREGOR: Yes. Your Honor, that's our position.

THE COURT: If that's her position, what do you state specifically in that regard, either that it did, that there is such testimony, or that it isn't necessary? I'm not sure.

MR. WILD [attorney for appellee]: Both. There is such testimony and it isn't necessary. That particular rule that Mrs. McGregor has enunciated I haven't heard of. I think it's a matter of semantics. It is a matter of splitting hairs. You don't have to ask an expert in those precise words and get an answer to those precise words. When an expert testifies that there were alternate ways to design a vehicle and the manner in which it was designed constituted an unreasonably dangerous condition, the jury can answer the ultimate question of negligence at the time. And they did.

Now, the case that is referred to continuously by the defendant, the Larsen case, states:

> "We do not agree that under the present state of the art an automobile manufacturer is under no duty to design an accident proof or foolproof vehicle or even one that floats on water. But such manufacturer is under a duty to use reasonable care in the design of its vehicle to avoid subjecting the user to an unreasonable risk of injury in the event of a collision. Collisions with or without fault of the user are clearly foreseeable by the manufacturer and are statistically inevitable."

So that is Larsen's definition. They say their duty of care is weighed by looking at whether or not they have in fact created an unreasonable condition.

The expert in this case was not asked that specific question that Mrs. McGregor said we had to ask. It is absolutely unnecessary. The totality of the evidence taken from Mr. McKibben, Mr. Severy, from Mr. Turnbow, from Mr. Albers all pointed out that they did not use due care and that this was unreasonably dangerous.

That, I believe, Your Honor, is the — with just one other point. Mrs. McGregor stated that Mr. McKibben stated very clearly that he did not know of the standards in 1958. He never stated that. At one point in time I did ask him about the — what he would have done in 1958, what he would have expected of the designers in 1958 as it related to the — to the retention system and the court sustained an objection on that as being without foundation and as being a leading question. And I tried to ask that two or three times as it related to the retention system.

But the fact of the matter is that is a matter of semantics and it is not appropriate. The jury can review the totality of the evidence as can the court. (Emphasis added).

We again disagree with appellee. The standard of care or state of the art can be established by expert testimony. Rules 702, 703, 704 and 705, Arizona Rules of Evidence. Here the

questions were not asked, and this aspect of duty was not established by the evidence.

This brings us to Volkswagen's contention that appellee has also failed to prove foreseeability and proximate cause elements of negligence theory. In the *City of Scottsdale v. Kobaska*, 17 Ariz. App. 120, 495 P.2d 1327 (1972) we said:

> We analyze the cases as saying that in the first instance foreseeability is always a question of law for the court. The court must determine the duty issue of whether an obligation is recognized by the law requiring the defendant to conform to a particular standard of conduct toward the plaintiff. This includes the question of whether the injury to the particular plaintiff was foreseeable. If it is not foreseeable then the trial judge usually disposes of the matter by dismissal, summary judgment, or the directed verdict route. If it is foreseeable and the duty is found by the trial court to exist, the trial court may or may not refer the foreseeability question to the jury by instruction on the issue of negligence. This issue is usually presented to the jury, as in Tucker v. Collar, *supra*, where there is a *debatable question* whether the injury to plaintiff was within the foreseeable scope of the risk or whether defendant was required to recognize the risk or take precautions against it. *See*, Annot. 100 A.L.R.2d § 3(d), p. 942, *supra*.

17 Ariz. App. at 126, 495 P.2d at 1333. (Emphasis in original). Thus, in the first instance the question of foreseeability is always part of the duty question and consequently a question of law for the court.

A brief review of the facts shows that the vehicle was a used 1958 model Volkswagen designed during the year 1957. The battery compartment was located under the right-rear passenger seat, and was designed to have a metal covering over the battery and a metal restraining strap holding it in place in its compartment under the seat. If in this case the appellee's injuries had resulted from acid leakage from a battery properly covered and restrained in accordance with the

Volkswagen's design requirements, far different questions would be presented for disposition in both the trial court and on this appeal. Such was not the case. It is uncontradicted that the replacement battery which powered the vehicle involved in this litigation and from which battery acid allegedly leaked after the accident, [2] had been installed in 1970, that it was too large to allow the continued usage of the designed battery cover or the metal restraining strap, and in fact, as installed was completely unrestrained in any manner. Thus, the essence of the foreseeability issue presented by the facts in this case is:

Whether Volkswagen's design was negligent in that in 1957 Volkswagen should have foreseen that in 1970 a replacement battery might be installed in the vehicle of an improper size and configuration, and that in addition the installer would forego the use of the designed battery cover and metal restraining strap, leaving the replacement battery completely unrestrained.

Although there is some evidence in the record that other batteries are generally more available than the battery designed to fit in this vehicle's battery compartment, there was no evidence presented that in 1957 Volkswagen had any knowledge that six-volt batteries too large to fit the designed restraining system were even on the market. Additionally, and particularly pertinent to the proximate cause issues in this case, there is absolutely no evidence showing that a larger battery than intended by Volkswagen's design of the system was used because the proper size battery was in fact unavailable. Further, there was evidence introduced that the proper "19L" batteries were available for purchase in the 1970 market.

Much testimony was presented by appellee's witnesses in this case concerning the alleged tendency of metal restraining straps to corrode and of metal covers to "short-

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[2] There was some evidence indicating that an additional battery was located on the back floor of the vehicle at the time of the accident.

circuit." However, the record fails to provide a foundation of materiality as to these alleged defects, since there was no showing that, *in this car,* the metal restraining strap corroded and became useless or that the metal cover for the battery ever caused a shortcircuit. The record does not show that the battery cover was discarded because the appellee's mother or her mother could not find a battery to fit under it. In short, no showing was ever made that, in this car, the battery restraining system was corroded or at all unusable.

In summary, the record is devoid of any evidence upon which liability could be imposed upon Volkswagen on the remaining negligence theory, after the trial court had granted directed verdicts for Volkswagen on the alleged roll-over tendency and carbon monoxide design defect theories. We hold as a matter of law, under applicable foreseeability principles, that the judgment entered by the trial court must be reversed and judgment entered for Volkswagen. We therefore answer Volkswagen's first question in the affirmative. The trial court erred in not granting Volkswagen's motion for judgment notwithstanding the verdict.

The judgment is reversed and this matter is remanded to the trial court with instructions to enter judgment in favor of Volkswagen.

WILLIAM E. EUBANK, JUDGE

CONCURRING:

LEVI RAY HAIRE, JUDGE

M E Y E R S O N, Judge, dissenting:

This is a complicated and difficult case. This action arose from a very unfortunate one-car accident which resulted in the tragic disfigurement of Julie Ann Kennon. Regrettably, it has taken the judicial system over six years from the filing

of the complaint in this matter to reach an appellate decision. The litigants are entitled to know that the delay in this court has resulted in large part from the fact that the dissenting judge orginally drafted what began as the majority opinion. After carefully reviewing the record and considering the multitude of errors raised by Volkswagen, this judge concluded that the judgment below should be affirmed. My colleagues have disagreed and I now must respectfully dissent from their decision.

The majority first concludes that the plaintiff failed to submit expert witness testimony concerning "battery system design standards of automobile manufacturers in 1957." I agree with the majority that under the facts of this case negligence must be proven through expert witness testimony. I disagree with their conclusion that no evidence of negligence was presented. Viewing the evidence most favorably to sustain the verdict, *Venerias v. Johnson,* 127 Ariz. 496, 499, 622 P.2d 55, 58 (App. 1980), I cannot conclude that "there is no evidence introduced that would justify a reasonable person returning a verdict" for the plaintiff. *Rocky Mountain Fire & Casualty Co. v. Biddulph Oldsmobile,* 131 Ariz. 289, 291, 640 P,2d 851, 853 (1982).

Preliminarily, the majority's conclusion that plaintiff was required to present testimony concerning automobile industry standards is plainly incorrect. The majority offers no authority whatsoever for the proposition that the plaintiff in a negligent design case must establish as an essential element of her case the deviation by the defendant from the general standards of the class of manufacturers in question. In effect, the majority holds that the ordinary custom and practice of a business or industry is the sole criterion as to what the alleged tortfeasor should have done. "Such an arbitrary rule [has] proved in the long run impossible to justify." W. Prosser, *The Law of Torts* § 33 at 167 (4th ed. 1971). Prosser has succinctly summarized the failures in the approach taken by the majority. *See generally id.* § 33. Although some industry practices are the result of "careful thought and decision . . .

others arise from the kind of inadvertence, carelessness, indifference, cost-paring and corner-cutting that normally is associated with negligence." *Id.* § 33 at 167.

> Even an entire industry, by adopting such careless methods to save time, effort or money, cannot be permitted to set its own uncontrolled standard.

Id. Thus, the plaintiff herein was not duty bound to present evidence of automobile industry practices in 1957.

This principle has been adopted in Arizona as exemplified by the flip-side of this issue. Our supreme court has held that the defendant's testimony that it has met general industry standards is not alone sufficient to relieve it from liability. In *Atchison, T. & S. F. Ry. Co. v. Parr,* 96 Ariz. 13, 391 P.2d 575 (1964), an employee was injured while moving pipe by a crane from a railway car to a truck. The operator could not see out of the compartment while operating the crane. The railroad company argued that the testimony demonstrated that the visibility from the cab of the crane was "about as good" as that for most other cranes. *Id.* at 17, 391 P.2d at 578. The court expressly held that such testimony, although admissible, could not relieve the railroad from liability. The failing of the majority's reasoning has been expressed concisely by Justice Holmes:

> What usually is done may be evidence of what ought to be done, but what ought to be done is fixed by a standard of reasonable prudence, whether it usually is complied with or not.

Texas & Pac. Ry. Co. v. Behymer, 189 U.S. 468, 470, 23 S. Ct. 622, 623, 47 L.Ed. 905, 906 (1903).

The proper way to frame the plaintiff's burden in this negligent design case is whether the expert witness testimony offered by the plaintiff established that the placement of the battery (or design of its tie-down system) in the passenger compartment created an unreasonable risk of injury in the event of an accident, in light of information known by automobile manufacturers in 1957. Stated another way,

whether in 1957, in the exercise of ordinary care, a safer design was feasible. Viewed in this light, there was ample expert witness testimony from which the jury could have concluded that Volkswagen was negligent in the placement of the battery in the passenger compartment.

Plaintiff's expert Jon S. McKibben testified that in 1957 automobile manufacturers were aware of the composition of batteries and knew that battery acid could cause serious injuries. He testified that at the time this particular Volkswagen was designed, an alternative design was feasible with regard to the placement of the battery. Indeed, he testified that in most vehicles driven in the United States the battery is located in the engine compartment or luggage compartment. He further testified that the placement of the battery in the passenger compartment posed safety hazards. Finally, he testified that Volkswagen knew in 1957 that most batteries have a life expectancy of two years and the plaintiff's car "probably came with the battery size and battery size cover which was almost impossible to fit . . . in the United States or into which it was almost impossible to fit an available battery size." In my view, there is sufficient testimony from which the trier of fact could have concluded that Volkswagen was negligent in the placement of the battery inside the passenger compartment.

As its second basis for reversal, the majority concludes as a matter of law that Volkswagen owed no duty to the plaintiff because it was not foreseeable twelve years after the car's manufacture, that a replacement battery of an improper size might be installed. It is only "where reasonable minds cannot differ" that a directed verdict on the issue of foreseeability is proper. *Arizona Pub. Serv. Co. v. Brittain,* 107 Ariz. 278, 281, 486 P.2d 176, 179 (1971). "[A] broad view must be taken of the class of risks and victims that are foreseeable." *McFarlin v. Hall,* 127 Ariz. 220, 222, 619 P.2d 729, 731 (1980). "It is not necessary that the exact manner in which the accident occurred could not have been foreseen if the injured person is within the foreseeable range of the negligent

conduct and the injury results from a recognizable risk." *Schnyder v. Empire Metals, Inc.*, 136 Ariz. 428, 430, 666 P.2d 528, 530 (App. 1983).

As the factual basis for its conclusion, the majority states that there was no evidence that in 1957 Volkswagen had any knowledge that 6-volt batteries which were too large to fit the design restraining system were even on the market. There was testimony, however, that Volkswagen replacement directives for the battery indicated one of a different size and configuration. The replacement battery called for was a battery which would not be held down properly by the restraining system. The majority further points out that there was no evidence showing that an oversized battery was used because the proper size battery was unavailable. The majority is correct that there was evidence that a proper-sized battery was available for purchase. But other testimony indicated the limited availability of the proper battery.

The majority's application of foreseeability principles is much too rigid and mechanical. In my view, the essential facts demonstrate that the plaintiff was within the scope of danger created by Volkswagen's conduct and that a reasonable person would be able to foresee a risk of harm to someone in the plaintiff's position. Of course, "collisions with or without fault of the user are clearly foreseeable by the manufacturer and are statistically inevitable." *Larsen v. General Motors Corp.*, 391 F.2d 495, 502 (8th Cir. 1968). Volkswagen placed the original battery in the passenger compartment with knowledge that its recommended replacement unit was too large to fit securely under the restraining system, and with the further knowledge that batteries must be replaced periodically. I cannot conclude that a reasonable person would not be able to foresee a risk of harm to someone in Julie Kennon's position.

Implicit in the majority's analysis is the suggestion that the act of the mechanic in replacing the battery with one which was too large to fit under the restraining system was an intervening and superseding cause of the injuries. Indeed

this was the argument expressly raised by Volkswagen. But only unforeseeable intervening acts rise to the level of a superseding cause of an injury. *Hemet Dodge v. Gryder,* 23 Ariz. App. 523, 528-29, 534 P.2d 454, 459-60 (1975). "If the likelihood that a third person may act in a particular manner is the hazard or one of the hazards which makes the actor negligent, such act . . . does not prevent the actor from being liable for harm caused thereby" *Parness v. City of Tempe,* 123 Ariz. 460, 464, 600 P.2d 764, 768 (App. 1979) (quoting from *Restatement (Second) of Torts* § 449 (1965)). For example, we have held that the installer of an incorrect radiator cap should have foreseen that the driver of the vehicle might try to remove the cap in the presence of others. *Hemet Dodge v. Gryder.* A burglar alarm company which left a key to the alarm system where an unauthorized person could obtain access to the controls and de-activate it, was held to be responsible for a burglary which was found to be foreseeable. *Central Alarm of Tucson v. Ganem,* 116 Ariz. 74, 567 P.2d 1203 (App. 1977).

Thus, I conclude that the act of the garage mechanic substituting an oversize battery in the vehicle was not a superseding cause which should relieve Volkswagen from liability in this case. Because of the limited availability of properly-sized batteries and the necessity of periodic replacement of batteries, the mechanic's actions were foreseeable and therefore not a superseding cause of Julie Kennon's injuries.

For the foregoing reasons, I respectfully dissent from the majority decision.

Bruce Meyerson, Judge

Rule 23. Petition for review

23(a) Time for filing; Cross-Petition. Within fifteen days after the filing of a decision or after the clerk has mailed notice of the determination of a motion for reconsideration, any party may file with the clerk of the Court of Appeals a petition for review by the Supreme Court. A cross-petition for review may be filed with the clerk of the Court of Appeals within fifteen days after either service of a petition for review or mailing by the clerk of notice of the determination of a motion for reconsideration.
Amended April 28, 1983, effective Sept. 1, 1983.

23(b) Priority of Motion for Reconsideration. In the event of the timely filing of a petition for review prior to the disposition of a motion for reconsideration, further proceedings relating to the petition or cross-petition for review shall be stayed until the clerk of the Court of Appeals has mailed notice of the court's ruling on the motion for reconsideration.

If a motion for reconsideration is granted, proceedings relating to the petition or cross-petition for review shall be further stayed until the clerk of the Court of Appeals has mailed notice of the court's ruling on any motion for reconsideration of the decision upon reconsideration, or until the time for filing a motion for reconsideration of such decision upon reconsideration has expired.

In the event a petition or cross-petition has become moot by reason of the granting of a motion for reconsideration, the petitioner or cross-petitioner shall give immediate written notice of such mootness to the clerk of the Court of Appeals prior to the transmittal of the partial record to the clerk of the Supreme Court as provided in Rule 23(d). Amended April 28, 1983, effective Sept. 1, 1983.

23(c) Form and Contents. The form of the petition or cross-petition for review shall comply with Rule 6(c) and the parties shall be designated as in the Court of Appeals. The petition shall not exceed twenty pages, exclusive of the ap-

pendix, and shall contain concise statements of the following:

1. A synopsis of the decision of the Court of Appeals. A copy of the decision shall be included in the appendix.

2. The issues presented for review.

3. The facts material to a consideration of the issues presented.

4. The reasons why the petition should be granted, which may include, among others, the fact that no Arizona decision controls the point of law in question, that a decision of the Supreme Court should be overruled or qualified, that conflicting decisions have been rendered by the Court of Appeals, or that important issues of law have been incorrectly decided.

All references to the record on appeal shall be supported by an appendix, with appropriate copies of the portions of the record which support the petition. The petition shall not incorporate any document by reference, except the appendices.
Amended April 28, 1983, effective Sept. 1, 1983.

23(d) Transmittal of Partial Record Upon Filing of a Petition for Review. Upon the expiration of the time for filing a cross-petition for review, the clerk of the Court of Appeals shall transmit to the clerk of the Supreme Court a partial record of the case consisting of the original and all copies of the petition or cross-petition for review, the original and all copies of the briefs filed in the Court of Appeals, and one copy of the decision of the Court of Appeals.
Amended April 28, 1983, effective Sept. 1, 1983.

23(e) Service and Response. The petitioner or cross-petitioner shall serve a copy of the petition or cross-petition on all parties who have appeared in the Court of Appeals. Any party wishing to oppose the petition or cross-petition may file with the clerk of the Supreme Court a response within fifteen days from the date provided for transmittal of the partial record to the clerk of the Supreme Court pur-

suant to Rule 23(d). The response shall comply with Rule 6(c) and shall not exceed twenty pages, exclusive of any appendix. All references to the record on appeal not contained in the petitioner's appendix shall be supported by an appendix to the response. The response shall not incorporate any document by reference except the appendices. Failure to file a response shall not be considered an admission that the petition should be granted.
Amended April 28, 1983, effective Sept. 1, 1983.

23(f) Order Granting Review. If the Supreme Court grants review, its order shall specify the issue or issues which are to be reviewed. The Supreme Court may order that the parties file additional briefs or that oral argument be heard, or both. If the order granting review does not provide for supplementation of briefs or for oral argument, either party may, within 15 days after the clerk mails notice of the Court's order, request the Court to do so by a motion specifying the reasons for supplementation or for oral argument, or both.
Amended April 28, 1983, effective Sept. 1, 1983.

23(g) Transmittal of Remaining Record. Upon notification by the clerk of the Supreme Court that a petition or cross-petition for review has been granted, the clerk of the Court of Appeals shall transmit the remaining record to the clerk of the Supreme Court.
Amended April 28, 1983, effective Sept. 1, 1983.

23(h) Denial of Petitions. When all petitions and cross-petitions for review have been denied, the clerk of the Supreme Court shall so notify the clerk of the Court of Appeals and the parties, and shall return the original copies of the briefs and the petition or cross-petition for review to the clerk of the Court of Appeals.
Amended April 28, 1983, effective Sept. 1, 1983.

CITIZENSHIP

AMENDMENT XIV—CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPORTIONMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of the male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of

the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

U.S.C.A. Const. Amend. 13-14—3

Appendix E

IN THE SUPREME COURT
STATE OF ARIZONA

PHYLLIS A. ROSSELL, Guardian ad litem of Julie Ann Kennon, a minor Plaintiff-Appellee, v. VOLKSWAGEN OF AMERICA, a corporation; VOLKSWAGENWERK A.G., a corporation; BLACK CORPORATIONS I through V, Defendants-Appellants,	No. 17778-PR 1 CA-CIV 5589 MARICOPA COUNTY SUPERIOR COURT NO. C-313867 REQUEST FOR SPECIFICATION OF ISSUE OR ISSUES TO BE REVIEWED AND REQUEST FOR ORAL ARGUMENT

I. ***Request for Specification of Issue or Issues to be Reviewed***

Appellants request that the Court "specify the issue or issues which are to be reviewed" as required by Rule 23(f), Rules of Civil Appellate Procedure. Appellants further request that the Court extend the time for the parties to request oral argument or to request leave to supplement their briefs to and including 15 days following the day the Clerk mails notice of the Court's specification of issue or issues which will be reviewed.

II. ***Request for Oral Argument***

Even in the absence of the Court's specification of the issue or issues to be reviewed, it is clear that this is a case in which oral argument is appropriate. First, this case involves ordinary and well established negligence principles, and is not particularly complicated from a legal point of view. It is, however, a case which took six weeks to try and has a voluminous trial transcript. The value of counsel's assistance in

such a case is obvious and is highlighted here by several misstatements of the record in both Judge Meyerson's dissenting opinion and in the Petition for Review. Further, where, as here, there is an extensive transcript and the issue of the existence of a prima facie case, counsel's assistance would be especially useful to the Court in determining the existence or nonexistence of specific testimony.

Second, since the Court of Appeals' opinion in this case was founded on long-established principles of negligence law, this Court's order granting the Petition for Review suggests that the Court may be considering making a change in those principles. If this is the case, the participation of the parties in the Court's dialog regarding a potential change seems particularly appropriate, both with respect to the desirability of any change in the law in general and, in particular, the desirability of effecting a change and applying it to the facts in this case.

RESPECTFULLY SUBMITTED this 3rd day of January, 1985.

FENNEMORE, CRAIG, VON AMMON,
UDALL & POWERS

/s/ Ruth V. McGregor

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Appendix F

SUPREME COURT OF ARIZONA

PHYLLIS A. ROSSELL, Guardian at litem of JULIE ANN KENNON, Appellee, vs. VOLKSWAGEN OF AMERICA, VOLKSWAGENWERK A.G., BLACK CORPORATIONS I through V, Appellants,	Supreme Court No. 17778-PR Maricopa County No. C-313867 *ORDER*

The Court having granted the petition for review by order dated December 18, 1984, NOW THEREFORE, Pursuant to Rule 23(b), ARCAP,

IT IS ORDERED:

1. Review is granted on both issues decided by the court of appeals.

2. Counsel may file simultaneous briefs supplementing the Petition for Review and Response on or before February 13, 1985. Said briefs shall not exceed thirty pages in length.

3. The case is set for oral argument at the College of Law, Arizona State University, on Thursday, February 21, 1985, at a time to be set at a later date. Counsel are allocated 20 minutes per side for argument.

4. In briefing and oral argument, counsel should address the following issues, among others raised by the decision of the court of appeals:

a. Must plaintiff prove non-compliance with industry standards or "state of the art" in a product liability case involving negligent design? Why or why not? If so, must plaintiff do so by expert testimony? Is there evidence in this

record from which the jury could have determined the issue of compliance with industry standards?

b. Is the doctrine of *Brady v. Melody Homes* applicable to this case? Why or why not? Are *Brady* and its progeny contrary to the principles set forth in *Byrns v. Ridell*? In negligent design-product liability case, does the plaintiff's burden of proof include a demonstration that the risks of the design outweigh the benefits?

c. Does the record support a finding that defendants could have foreseen the manner in which plaintiff was injured? If not, are defendants relieved of liability? Why or why not?

DATED this 22nd day of January, 1985

/s/ William H. Holohan
WILLIAM H. HOLOHAN
Chief Justice

TO:

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Appendix G

IN THE
SUPREME COURT OF THE STATE OF ARIZONA

PHYLLIS A. ROSSELL, Guardian ad litem of JULIE ANN KENNON, a minor, Plaintiff-Appellee, v. VOLKSWAGEN OF AMERICA, a corporation; VOLKSWAGENWERK A.G., a corporation; BLACK CORPORATIONS I through V, Defendants-Appellants.	SUPREME COURT NO. 17778-PR COURT OF APPEALS DIVISION ONE NO. 1 CA-CIV 5589 MARICOPA COUNTY NO. C-313867

DEFENDANTS'
MOTION FOR RECONSIDERATION

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I. *INTRODUCTION*

"GREAT CASES, LIKE HARD CASES, MAKE BAD LAW." [1]

Denying recovery to a badly-injured plaintiff is difficult, for courts as well as for juries. To permit recovery in this action, however, the Court is forced to establish a new and unworkable standard to measure the need for expert testimony; to rely upon facts not in the record or the proper subject of judicial notice; and to ignore glaring errors in the record. By doing so, the Court denies defendants equal protection and due process of the law.

The central issue in this case is "what type of proof must plaintiff produce in order to make a prima facie case of negligent design against the product manufacturer? What is the standard of care?" Slip op. at 7. This Court holds that there are at least two standards of care in negligence cases.

One standard applies to malpractice cases involving "professionals who generally work in close relationship with their clients or patients." *Id.* at 11. According to the Court, "professionals" are allowed to create their own standard of care because their "nature" and their "special relationship" with their clients ensures that that standard will be set "with primary regard to protection of the public rather than to such considerations as increased profitability." *Id.* at 11. Plaintiffs, in negligence cases against professionals, must continue "to establish by expert testimony the usual conduct of other practitioners of defendant's profession and to prove, further, that defendant deviated from that standard." [2] *Id.* at 8.

The other standard applies to manufacturers (and perhaps others) who supposedly lack both the close "working relationship" and the "concern" for their customers' welfare

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[1] *Northern Securities Company v. United States*, 193 U.S. 197, 400 (1904) (Holmes, J., dissenting).

[2] The Court nowhere defines what occupations are filled by "professionals" or how close a relationship between provider and consumer is necessary to trigger the need for expert testimony.

that ordinarily characterize the professions. These defendants must adhere to the " 'reasonable man' standard." *Id.* at 7, 12. To prove what is reasonable care for manufacturers, "the plaintiff need not present any "direct evidence about the details of what may or may not comply with the standard of care." *Id.* at 7. In these negligence cases, the jury may decide what is reasonable from mankind's "common experience." *Id.* at 12.

The Court's announcement of at least two distinct evidentiary standards for proving negligence significantly departs from both existing Arizona law and the law of other jurisdictions. The creation of a double standard also creates significant constitutional issues.

II. *THE DECISION DENIED DEFENDANTS EQUAL PROTECTION OF THE LAW.*

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution precludes the arbitrary classification of persons by the judiciary. *Sexton v. Barry*, 233 F.2d 220 (6th Cir.), *cert. denied*, 352 U.S. 870 (1956); *Republic Pictures Corp. v. Kappler*, 151 F.2d 543, 547 (8th Cir. 1945), *aff'd*, 327 U.S. 757 (1946). If there is no reasonable relationship between the classification adopted and the goal sought to be achieved, the classification violates the Equal Protection Clause. *Truax v. Corrigan*, 257 U.S. 312, 337 (1921).

This Court's Opinion violates these basic precepts in adopting one standard of proof for negligence claims against professionals, and another standard for claims against manufacturers. The Court holds that in this complex design defect case, in which both sides in fact presented expert proof, expert testimony is unnecessary to establish the relevant standard of care and defendants' alleged deviation from it. The distinction is justified only by the Court's factually unsupported assumption that all manufacturers callously disregard the public welfare in pursuit of increased profits. (*See* discussion at pp. 6-8, *infra.*) Professionals, on the other

hand, are somehow different. This purported distinction cannot withstand even minimal scrutiny.

Concededly, a distinction may be drawn between those cases that require expert testimony and those that do not. The question, therefore, is where to draw the line.

Traditionally, expert testimony has been required in cases in which the appropriate standard of care is not a matter of common knowledge. *See* M. Udall & J. Livermore, *Law of Evidence* § 25 at 43-44 (2d ed. 1982) (hereinafter "Udall"). Hence, its necessity has depended upon the relative complexity or sophistication of the factual issues involved. Distinctions drawn on this basis clearly are rationally related to the legitimate public purpose of assuring the just resolution of disputes.

In this case, however, the Court has changed the focus of the inquiry from the complexity of the issues to the mere identity of the defendant or the class to which it belongs. This distinction is not rationally related to the goal of justly resolving negligence controversies. Certainly, design defect cases which essentially allege automotive engineering malpractice can involve issues every bit as complex and incomprehensible to the typical juror as those involved in medical malpractice actions. [3] Yet, under the Court's Opinion, expert testimony is purportedly unnecessary to establish the negligence of the manufacturer so long as the product is mass-produced and the manufacturer has no interaction with the

[3] For example, in a case claiming an ethical drug has been negligently designed, determining the drug manufacturer's liability will depend upon considering the dangers inherent in the drug as designed, the benefits attainable through use of the drug, feasible design alternatives, the cost of producing the drug relative to the cost of the alternatives, and potential dangers associated with the alternate designs, all within the time frame of the drug's manufacturer and release to the public. Surely, such information is beyond the typical juror's knowledge and experience. Similarly, the complex risk/utility factors of battery placement design and accompanying safety restraints is a matter of expert consideration.

ultimate consumer.[4] The arbitrary, factually unsupportable classification adopted by the Court based on its perception of the differences in character between "professionals" and all others is not rationally related to a legitimate state purpose and, hence, is violative of the Equal Protection Clause of the Fourteenth Amendment.

III. *THE COURT'S HOLDING THAT EXPERT TESTIMONY CONCERNING THE STANDARD OF CARE IS UNNECESSARY IN "NONPROFESSIONAL" CASES INVOLVING COMPLEX ISSUES IS CONTRARY TO EXISTING ARIZONA LAW.*

This Court is not free to remake the common law. *Jeune v. Del E. Webb Construction Co.*, 77 Ariz. 226, 228, 269 P.2d 723, 724 (1954). Yet, prior to the Court's opinion, no reported authority supported the proposition that the nature of proof required to establish the standard of care in negligence cases depended upon the identity of the defendant.[5] Until now, Arizona law has required a plaintiff alleging negligence to present expert testimony on the standard of care and defendant's breach thereof whenever these issues were

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[4] The Court's disclaimer of an intent to "disturb the rule that in determining what is 'reasonable care,' expert evidence may be required in those cases in which factual issues are outside the common understanding of jurors," slip op. at 12, provides no solution to this problem. The Court does not indicate that its refusal to require expert testimony is predicated upon the simplicity of the issues presented. Rather, the Court's refusal to require expert testimony in this case is premised on two factors: (1) the mass-production of the product, and (2) the lack of direct interaction between the manufacturer and the ultimate consumer. *Id.* at 10-11. These same factors are present in almost all product liability cases.

[5] The discussion in W. Prosser & W. Keeton, *The Law of Torts* (5th ed. 1984) (hereinafter "Prosser"), to which the Court refers, do not support this proposition.

beyond the common understanding of a lay person.[6] Udall § 25 at 43. Without such testimony, a jury cannot resolve, without speculating, the question of whether a defendant's conduct fell below the applicable standard.[7]

The complex risk/utility issues in this case, involving battery retention design and location within an automobile, are concededly beyond the common knowledge of the jury. Even this Court labors hard to refer selectively to unsubstantiated expert testimony and facts outside the record to justify the result. Hence, without the benefit of expert testimony, the jury could not have determined the relevant standard of care in 1958 and assessed defendants' alleged deviation therefrom. It is inconceivable that the testimony below, which was unrelated to the time of the vehicle's design and manufacture, would be sufficient to establish that Volkswagen's battery retention design was defective and that the company was negligent in using that design. *See, e.g., McClellan v. Chicago Transit Authority*, 340 N.E.2d 61, 63 (Ill. App. 1975); *Westinghouse Electric Corporation v. Nutt*, 407 A.2d 606, 612 (D.C. App. 1979).

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[6] This evidentiary concept is related to the substantive tort law principle that a person must act consistently with whatever superior knowledge or skill he might possess. Prosser, § 32 at 185-86. This more stringent standard of care is not restricted to members of the professions, but rather is imposed upon all persons undertaking conduct requiring special skill and on all persons actually possessing such skill. *Id.* Although acknowledging that most of the decided cases involve doctors, Prosser states that the enhanced standard is applicable to cases involving members of professional or skilled trades. *Id.*

[7] The Court states that explicit expert testimony concerning the standard of care and deviation therefrom is required only in professional malpractice cases, citing Udall, § 25 at 43-44. Slip op. at 12. This reliance is misplaced. The discussion in Udall, § 25 concludes with the statement that "These same rules apply to other litigated matters beyond a jury's competence." *Id.*, § 25 at 45. *Accord* Prosser, § 32 at 185-86.

IV. *THE COURT'S OPINION RELIES ON MATTERS THAT WERE NOT IN THE RECORD.*

The Court's conclusions underlying the double evidentiary standard now applicable to negligence cases, and concerning the evidence here presented, are based on hypothetical facts that are neither matters of record, reasonable inferences drawn therefrom, nor facts subject to judicial notice. As a result, the Court violated the basic tenet that its duty is to apply general principles of law to specific facts, and not to tailor the law or the facts to fit a preconceived result. *See Commercial Standard Insurance Co. v. Cleveland,* 86 Ariz. 288, 295, 345 P.2d 210, 215 (1959).

The Court permits professionals to set their own standards of care because

> the nature of the group and its special relationship with its clients assure society that those standards will be set with primary regard to protection of the public rather than to such considerations as increased profitability. . . . [T]he necessities of the marketplace permit manufacturers neither the working relationship nor the concern about the welfare of their customers that the professions generally permit and require from their practitioners.

Slip op. at 11-12. How the Court found these crucial facts is shrouded in mystery, for they are wholly unsupported by the record and are not judicially noticeable. The record provides no evidence concerning the "marketplace" or its "necessities"; no evidence of manufacturers' working relationships with their customers or any lack of care for consumers; [8] and no evidence as to the special solicitude of professionals for their clients. Hence, there is no basis in the record for the

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[8] In fact, a better assumption is the reverse since it is "common knowledge" that automobile manufacturers' executives, employees, and their wives and children, drive the cars they build. There is, thus, an even greater incentive for safety and even more concern for the consumer than a professional might have.

Court's double standard of proof. [9] Next, purporting to apply its newly-announced rule to the "facts," the Court states:

> There was evidence from which the jury could find that from both an engineering and practical standpoint the 1958 Volkswagen could have been designed with the battery outside the passenger compartment. . . .

Id. at 12. Although plaintiff did present some speculative testimony regarding the possibility of placing the battery inside the trunk or engine compartment, TR 10/9/79, pp. 44-45, there was no testimony regarding the possible risks and benefits associated with such an alternate design. [10] Absent such testimony, the trier of fact could not, as a matter of law, have determined that Volkswagen was negligent for failing to adopt an alternative design without speculating. [11]

Finally, the Court pays mere lip service to the rule that "the contemporaneous foreseeability of unreasonable danger is the litmus test for negligent conduct." Slip op. at 13. The Court finds that it was foreseeable in 1957 that putting a battery in the passenger compartment created an unreasonable risk of harm. *Id.* at 14. This finding is based, howev-

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[9] The Court further ignores factors that compel automobile manufacturers to act in the public interest. The National Traffic and Motor Vehicle Safety Act, 15 U.S.C. §§ 1381-1431 (1982), requires manufacturers to notify purchasers of defects discovered after the time of sale, 15 U.S.C. §§ 1381, 1411, and empowers the Secretary of Transportation to issue motor vehicle safety standards. 15 U.S.C. § 1392(a). Regulations issued pursuant to the Act are technical and cover virtually every component of the automobile. 49 C.F.R. §§ 571.101-571.302 (1984). Noncompliance with these standards may result in civil sanctions, 15 U.S.C. § 1398(a), § 1400(a). These regulations create strong incentives to manufacture safe cars and thereby to serve the public interest.

[10] In fact, Mr. McKibben's opinion that an alternative design was "feasible" was based solely on the fact "that the vast majority of vehicles used another location." TR 10/9/79, p. 45.

[11] *See Barker v. Lull Engineering Co.*, 20 Cal. 3d 413, 431, 143 Cal. Rptr. 225, 237, 573 P.2d 443, 455 (1978); *Akers v. Kelley Co.*, No. A016737, slip op. (Cal. App. Oct. 22, 1985); *Brown v. Dahl*, 41 Wash. App. 565, 705 P.2d 781, 786 (Wash. App. 1985).

er, on testimony that does not relate to the time of design or manufacture of the Rossell vehicle. For example, the Court relies on testimony that properly restrained batteries can fracture, *id.* at 14; that only a small minority of cars have batteries within the passenger compartment, *id.* at 12; that batteries fracture in crashes, "not infrequently," *id.* at 13; and that battery restraint systems are subject to corrosion, "so that even a properly sized battery might be dislodged in a rollover type accident." *Id.* at 14. This evidence is unrelated to the vehicle in this accident, its design, or the time of its design or manufacture.

Even assuming these and other generic dangers had been related to the car in question, the testimony still is insufficient to prove negligence. Since negligence focuses upon the reasonableness of the manufacturer's conduct, plaintiff must necessarily prove that the manufacturer acted unreasonably. Proof of this fact requires evidence that, at the time of manufacture, the manufacturer knew or should have known of the unreasonable risk of harm and acted unreasonably in not remedying that risk. Slip op. at 13, *citing Restatement (Second) of Torts* § 289, comment b (1965). There is *no* such evidence in this case. [12]

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[12] The Court not only distorts the facts here presented, but also mischaracterizes defendants' arguments. According to the Court, Volkswagen argues that in negligent design cases, a manufacturer cannot be held liable "absent a showing that he failed to conform to the standard of care in design followed by other manufacturers." Slip op. at 10. Yet, defendants have repeatedly disclaimed reliance upon this position. *E.g.*, Defendants' Supplemental Brief on Review, pp. 2-3. Instead they have consistently maintained that the inquiry regarding the standard of care concerns the conduct of a reasonable automobile manufacturer in 1957 in light of the knowledge reasonably available at that time. In light of plaintiff's evidence that less than 5% of the cars had batteries inside the passenger compartment, it is absurd to maintain that defendants seek to absolve themselves from negligence on the basis of an industry custom with which they did not comply.

V. *THE COURT'S DECISION VIOLATES DEFENDANTS' DUE PROCESS RIGHTS.*

The Due Process Clause of the Fourteenth Amendment, which is designed to guard against arbitrary governmental action of all kinds, acts as a restraint upon the powers exercised by each of the three branches of government. *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 276 (1855). The decision herein violates defendants' due process rights in two respects.

A. *The Court's Reliance Upon Facts Neither Supported by the Record Nor Capable of Judicial Notice Violates Due Process.*

Generally, an appellate court is not a trier of fact and its decision must be confined to those facts that appear in the record. *State Farm Mutual Auto Insurance Co. v. White*, 563 F.2d 971, 977 (9th Cir. 1977); *Jackson v. Statler Foundation*, 496 F.2d 623, 626 (2nd Cir. 1974). If, however, a fact is capable of judicial notice, it may be considered by the appellate court. *See* Ariz. R. Evid. 201(f). By relying upon several facts neither supported by the record nor capable of judicial notice, [13] this Court violates basic precepts regarding the scope of appellate review.

Additionally, by relying on such facts, this Court deprives defendants of due process. The right of meaningful access to the courts lies at the heart of the due process clause. *Dreher v. Sielaff*, 636 F.2d 1141, 1143 (7th Cir. 1980); *Stypmann v. City and County of San Francisco*, 557 F.2d 1338, 1343-44 (9th Cir. 1977); *see Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). Implicit in the concept of *meaningful* access is the right of each party to a full and fair opportunity to litigate his particular claims. *Hardy v. Johns-Manville Sales Corp.*, 681 F.2d 334, 338 (5th Cir. 1982). If the court does not base its decision upon facts contained in the record, this right has

[13] Defendants have previously discussed the various "facts" relied upon by the Court which are not supported by the record. *See* section IV, *supra*.

been impermissibly abridged. [14] The party disadvantaged by the court's departure from the record nas effectively been denied the opportunity to present evidence in support of his contentions and to obtain the fair adjudication of his claims. The Court has rendered its decision upon a hypothetical set of facts and by so doing has denied defendants their day in court in violation of the due process guarantee of the Fourteenth Amendment.

B. *The Court's Failure to Follow Its Own Procedural Rules Violated Due Process.*

Rule 23(f) of the Arizona Rules of Civil Appellate Procedure requires the Supreme Court, in its order granting review, to "specify . . . the issues which are to be reviewed." In this case "[r]eview [was] granted on both issues decided by the Court of Appeals." *Rossell v. Volkswagen,* No. 17778-PR, Order (Ariz. Jan. 22, 1985). Yet in its opinion, the Court addresses "the remaining issues which defendant raised on appeal *and which the Court of Appeals did not address.*" Slip op. at 20 (emphasis added).

By considering these issues in contravention of its own rules, the Court violated defendants' due process rights. "When the sovereign has established rules to govern its own conduct it will be held to the self-imposed limitations on its

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[14] The requirements of the due process clause are flexible and its application depends upon the facts of the particular case. *Mathews v. Eldridge,* 424 U.S. at 334. In various situations, courts have concluded that judgments rendered on the basis of facts or issues which the losing party has had no opportunity to rebut violate due process. *See, e.g., In re Japanese Electronic Products Antitrust Litigation,* 723 F.2d 238, 304 n.55 (3rd Cir. 1983) (judgment supported by no evidence on its essential elements violates due process); *Jiminez v. Tuna Vessel "Granada",* 652 F.2d 415, 421 (5th Cir. 1981) (finding of unseaworthiness on a basis neither pled by plaintiff nor set out in pretrial order denied due process); *Carter v. Morehouse Parish School Board,* 441 F.2d 380, 382 (5th Cir.) (per curiam) (ruling based upon evidence which a party has not been allowed to confront or rebut violates due process), *cert. denied,* 404 U.S. 880 (1971). These cases broadly support the existence of a due process violation in the case at bar.

own authority, departure from which denies procedural due process of law." [15] *Bluth v. Laird*, 435 F.2d 1065, 1071 (4th Cir. 1970); *accord Derrickson v. Board of Education*, 703 F.2d 309, 315 (8th Cir. 1983) (failure of state agency to follow its own regulations may violate due process); *see Smith v. State of Georgia*, 684 F.2d 729, 732 n.6 (11th Cir. 1982) (disregard for state procedures may support a due process claim). The Ninth Circuit explained the rationale behind the rule as follows:

> Failure to follow such guidelines tends to cause unjust discrimination and to deny adequate notice contrary to fundamental concepts of fair play and due process.

N.L.R.B. v. Welcome-American Fertilizer Co., 443 F.2d 19, 20 (9th Cir. 1971). Hence, the scope of the Court's decision denied defendants their right to procedural due process.

VI. *EVEN BY THE COURT'S STANDARD, EVIDENCE OF THE VOLKSWAGEN'S PROPENSITY TO INTRODUCE CARBON MONOXIDE INTO THE PASSENGER COMPARTMENT IS INADMISSIBLE.*

Volkswagen argues that plaintiff's references to the vehicle's rollover and carbon monoxide "propensities," after a directed verdict on these issues, denied defendants a fair trial. The Opinion states that "[p]laintiff could argue all evidence relevant to her theory of negligent battery design, whether she originally brought the case under that theory alone or under several theories, some of which were later dis-

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[15] The United States Supreme Court has previously invalidated the actions of administrative agencies on the basis of their failure to adhere to their procedural rules. *Service v. Dulles*, 354 U.S. 363 (1957); *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954). Although these decisions rested upon principles of federal administrative law, *Board of Curators v. Horowitz*, 435 U.S. 78, 92 n.8 (1978), commentators have concluded that they indicate the relevance of such procedural irregularities to due process analysis. *See*, J. Nowak, R. Rotunda & J. Young, *Constitutional Law*, Ch. 15 § III at 576 (2d ed. 1983).

missed. Directed verdicts on some theories do not change what is relevant to remaining theories." Slip op. at 21.

Even by the Court's own standard, evidence of the vehicle's "propensity" to introduce carbon monoxide into the passenger compartment was not admissible. The case was submitted to the jury "only on the question of Volkswagen's negligence in locating the battery inside the passenger compartment." Slip op. at 5. The only conceivable theory under which the car's propensity to introduce carbon monoxide would be relevant to this question is that Volkswagen could have foreseen that a driver, narcotized by the effects of carbon monoxide, would have an accident and that the battery's location would then cause physical harm. This theory is so attenuated, and the evidence so prejudicial, that its introduction constitutes reversible error.

VII. *THE COURT'S RULING ON THE ILLUSTRATIVE EVIDENCE QUESTION IS CONTRARY TO PRIOR ARIZONA LAW.*

Volkswagen argued that the trial court erred by admitting four large charts, prepared by Charles Turnbow, a safety engineer, concerning the effect on humans of certain levels of carbon monoxide. Volkswagen contends that these charts were hearsay, and that even if they were not, they could only have been read into the record and not received physically into evidence. In refuting Volkswagen's position, the Court stated that "[t]he charts did not purport to be excerpts from the treatises, but only the opinions of the witness as to what the articles established. [The trial judge admonished the jurors that they should regard the charts] only as illustrative of the witness' opinions as to the effects of carbon monoxide." Slip op. at 25-26.

Under Arizona law, juries may not, in the jury room, see visual evidence of one witness' testimony to the exclusion of others. *Town & Country Securities Co. v. Place*, 79 Ariz. 122, 125, 285 P.2d 165, 167 (1942); *Gallagher v. Viking Supply Corp.*, 3 Ariz. App. 55, 60, 411 P.2d 814, 819 (Ariz. App. 1966). The jury's consideration of such demonstrative

evidence during deliberations emphasizes unduly the testimony represented therein. *Gallagher,* 3 Ariz. App. at 60, 411 P.2d at 819. The Court's ruling on this matter is directly contrary to prior Arizona law and warrants reconsideration.

VIII. *CONCLUSION*

This Opinion is incorrect not simply because the result is unjustified, but because the standards used by the Court to rationalize the result are illogical and constitutionally infirm. The Court has, in effect, ignored the *negligence* calculus of this case. That is, rather than consider whether Volkswagen acted as a "reasonably prudent manufacturer under similar circumstances in 1957," the Court instead has developed a *post hoc* "strict liability" focus upon the end result of the product some 22 years later.

These newly-minted criteria send the wrong signals to all segments of the legal community. The deterrent effect of tort law is impaired because the reasonably prudent manufacturer (or one not shown to be imprudent) is penalized regardless of good practice. If a manufacturer can be held "negligent" on the basis of the jury's speculations in a complex case, all members of the community are made to suffer well beyond the interest of the litigants in this case.

This Court should recall its Opinion. If a *post hoc* new law of negligence is declared, the matter minimally should be remanded for new trial proceedings in which both sides can litigate the narrow issue presented in accordance with a new species of negligence law that the parties and the trial court will understand as the law of Arizona.

In presenting these arguments, defendants have been severely constrained by the page limitation imposed by the Court. Nonetheless, defendants respectfully contend that the arguments presented herein warrant the reconsideration of this case. Defendants would welcome the opportunity to submit additional briefs on any or all of the arguments set forth in this motion.

RESPECTFULLY SUBMITTED this 21st day of November, 1985.

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CERTIFICATE OF MAILING

A copy of Defendants' Motion for Reconsideration was mailed this 21st day of November, 1985, to:

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Supreme Court, U.S.
FILED
APR 16 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

No. 85-1518 (2)

VOLKSWAGEN OF AMERICA, a corporation
and
VOLKSWAGENWERK A.G., a corporation,
Petitioners,

vs.

PHYLLIS A. ROSSELL, guardian ad litem
of **JULIE ANN KENNON,** a minor,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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PHYLLIS A. ROSSELL, guardian ad litem
of **JULIE ANN KENNON,** a minor,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, Phyllis A. Rossell, guardian ad litem of Julie Ann Kennon, a minor, respectfully requests that this Court deny the Petition for Writ of Certiorari seeking review of the Arizona Supreme Court's opinion in this case. That opinion is reported at 709 P.2d 517, ___ Ariz. ___ (1985).

REASONS WHY THE PETITION SHOULD BE DENIED

The questions presented by the Petition for Certiorari are:

1. Whether this Court has jurisdiction to consider a petition for certiorari based on an alleged federal question raised for the first time on a motion for reconsideration filed in the state supreme court.

2. Whether the Equal Protection Clause requires that a state treat manufacturers in negligence cases as "professionals," rather than as ordinary citizens.

3. Whether the Due Process Clause prohibits a state court from exercising its appellate jurisdiction in order to review issues not previously decided by a lower appellate court.

The Equal Protection argument raised in the Petition for Certiorari was raised for the first time in a motion for reconsideration filed in the Arizona Supreme Court. *See* Defendants' Motion for Reconsideration, a copy of which is attached as Appendix G to the Petition for Writ of Certiorari. Raising a federal question for the first time in a motion for rehearing addressed to the highest state court is generally insufficient unless the Court actually entertains the petition and expressly decides the question. Stern, Gressman & Shapiro, *Supreme Court Practice* (6th ed. 1986) at p. 155, *citing Radio Station WOW v. Johnson,* 326 U.S. 120, 128 (1945); *Hanson v. Denckla,* 357 U.S. 235, 243-44 (1958); *Herndon v. Georgia,* 295 U.S. 441, 443 (1935). Here, the Equal Protection issue was not raised at any time prior to the motion for reconsideration. Moreover, the motion for reconsideration was not entertained, but was summarily denied.

The distinction between professional and non-professional defendants in negligence cases is nothing "newly created" by the Arizona Supreme Court. The distinction is well known in every jurisdiction in America. It is recognized by such authorities as Prosser in his treatise on torts and is taught to every first year law school student throughout the country. The Arizona Supreme Court's holding was not arbitrary and capricious, as Petitioners suggest; rather, the court followed a long tradition in holding that manufacturers are to be treated just as any other defendant in a negligence case. Nowhere does the Constitution indicate that manufacturers are entitled to any special preference not allowed to other defendants in negligence cases. Accordingly, no federal question is involved and Petitioners' request should be denied.

Petitioners' second complaint is that the Arizona Supreme Court violated the Due Process Clause of the Constitution by reviewing issues not decided by the court of appeals. Petitioners' assertion that the court's action was contrary to Arizona law is without merit. The Arizona Constitution grants the Arizona Supreme Court jurisdiction to decide all issues necessary to resolve any appeal. Ariz. Const. Art. VI, § 5(3); *see also Hancock v. State*, 254 P.2d 225, 31 Ariz. 389 (1927) (appellate court which accepts review takes jurisdiction of the case for all purposes). Moreover, it is manifest that the only manner in which the Petitioners could have been prejudiced by the supreme court's accepting jurisdiction on these issues would be the speculative hope that the court of appeals on remand would issue an erroneous decision (i.e., contrary to that already rendered by the supreme court) and that the Arizona Supreme Court in its discretionary review power would decline to accept review to correct this error. Our Federal Constitution does not include the right to such erroneous rulings.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that the Court deny Petitioners' Petition for a Writ of Certiorari and, additionally, that the Court grant Respondent her costs in opposing the Petition, as well as imposing sanctions pursuant to U.S. Supreme Court Rule 49.2, 28 U.S.C.A.

RESPECTFULLY SUBMITTED this 16th day of April, 1986.

LANGERMAN, BEGAM,
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CERTIFICATE OF MAILING

The original and forty (40) copies of the foregoing Brief in Opposition to Petition for Certiorari were delivered this 16th day of April, 1986, to the Supreme Court of the United States and two (2) copies each were delivered to:

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APPENDIX A

Arizona Constitution Article VI, § 5(3):

"The Supreme Court shall have:

* * *

"Appellate jurisdiction in all actions and proceedings except civil and criminal actions originating in courts not of record, unless the action involves the validity of a tax, impost, assessment, toll, statute or municipal ordinance."

Supreme Court, U.S.
FILED
APR 21 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

No. 85-1518

VOLKSWAGEN OF AMERICA, a corporation,
and
VOLKSWAGENWERK A.G., a corporation,
Petitioners,

vs.

PHYLLIS A. ROSSELL, guardian ad litem
of **JULIE ANN KENNON,** a minor,
Respondent.

PETITIONERS' REPLY IN SUPPORT OF THEIR PETITION FOR WRIT OF CERTIORARI

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Petitioners Volkswagen of America and Volkswagenwerk A.G. hereby reply in support of their petition for writ of certiorari to review the decision of the Supreme Court of the State of Arizona.

REASONS FOR GRANTING THE PETITION

Respondent, in her Brief in Opposition to the Petition, distorts and mischaracterizes Petitioners' arguments, as she has done at all stages of this litigation. Respondent's arguments against granting the petition are: (1) that the constitutional issues were not timely raised; (2) that the distinction between professional and nonprofessional defendants in negligence cases was not newly created by the

Arizona Supreme Court and product manufacturers are entitled to no special privileges; (3) that no due process violation occurred by virtue of the Arizona Supreme Court's disregard of its own rules because that court has jurisdiction under the state constitution to decide all issues necessary to the resolution of the case; and (4) that sanctions for a frivolous petition should be imposed pursuant to Rule 49.2, Rules of the Supreme Court. All of these arguments lack merit. More importantly, Respondent has not even attempted to refute Volkswagen's argument that the state court's reliance on facts not contained in the record violated due process of law.

Respondent wrongly contends that Volkswagen failed to raise the constitutional issues addressed in its petition in a timely fashion. The constitutional violations there alleged are each premised upon the manner in which the Arizona Supreme Court decided this case. Volkswagen, being less than omniscient, had no advance indication that the court would trample Volkswagen's substantive constitutional rights in deciding the case. Thus, the constitutional arguments were timely, even though they were not raised until the motion for reconsideration. *See, e.g., Brinkerhoff-Faus Trust Co. v. Hill,* 281 U.S. 673, 677-78 (1930) (if federal question is created by an unexpected decision of the highest state court, the fact that the federal issue is not briefed until a motion for reconsideration does not defeat the Supreme Court's authority to review the issue).

Respondent's contention that courts previously have distinguished between "professional" and "nonprofessional" defendants for purposes of determining the standard of proof in negligence cases is patently untrue. Respondent cites no authority for this position and does not dispute the contrary authority cited in the petition. *See* Ariz. R. Evid. 702; M. Udall & J. Livermore, *Law of Evidence* § 25, p. 43-44 (2nd ed. 1982). Rather, Respondent attempts to change the focus of the inquiry by suggesting that Volkswagen is trying to obtain some special preferential treatment for product man-

ufacturers. It is this kind of distortion of Volkswagen's arguments that contributed to the miscarriage of justice in the state court, and should be given short shrift in deciding the merits of the petition for writ of certiorari. The focus of the inquiry must remain on the decision of the Arizona Supreme Court and whether that court's newly created distinction between professional and nonprofessional defendants violates Volkswagen's equal protection rights under the Fourteenth Amendment of the United States Constitution.

Respondent's third argument demonstrates her total failure to comprehend Volkswagen's contentions. Respondent asserts that because the state court is authorized to decide all issues necessary to resolve an appeal, *see* Ariz. Const. art. VI, § 5(3), it did not deny due process to Volkswagen by failing to specify the issues on which review was granted. Volkswagen does not contend that the court lacked authority under the state constitution to decide all of the issues in the case. Rather, Volkswagen maintains that the court failed properly to exercise its authority. Rule 23(f) of the Arizona Rules of Civil Appellate Procedure, promulgated by the Arizona Supreme Court, requires the court, in its order granting review of a case, to specify the issues which are to be reviewed. Here, in response to Volkswagen's request for specification filed pursuant to Rule 23(f), the Arizona court stated that review was granted on both issues decided by the Court of Appeals. Yet, the state court proceeded thereafter to consider issues not addressed by the Court of Appeals. Hence, even though the state constitution conferred authority to review all issues in this case, the state court's failure to follow its own procedural rules regarding the specification of the issues to be reviewed denied Volkswagen due process. *See, e.g., Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 431-34 (1982); *United States v. Nixon*, 418 U.S. 683, 696 (1974); *N.L.R.B. v. Welcome-American Fertilizer Co.*, 443 F.2d 19, 20 (9th Cir. 1971); *Bluth v. Laird*, 435 F.2d 1065, 1071 (4th Cir. 1970).

Respondent's final argument is that this Court should impose sanctions for a frivolous appeal pursuant to Rule 49.2, Rules of the Supreme Court. The issues raised in the petition clearly are not frivolous. In *In re Asbestos Litigation*, No. 85-381, slip op. (D.N.J. 1986), a fourteen-judge panel of the district court considered whether a New Jersey rule, which distinguishes among various classes of product manufacturers with regard to the availability of the "state-of-the-art" defense in strict liability actions, violated the equal protection clause. That issue essentially is indistinguishable from the issue raised in the present case. Although the district court upheld the constitutional validity of the distinction, the panel split eight to six. Any issue upon which there could be such a marked difference of opinion cannot be characterized as frivolous.

CONCLUSION

Respondent has mischaracterized the arguments advanced by Volkswagen instead of responding to them. Under the relevant precedents, the decision of the Arizona Supreme Court violated Volkswagen's right to due process of law and to the equal protection of the laws. Consequently, a writ of certiorari should be granted to review the decision of the Supreme Court of Arizona.

Respectfully submitted,

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April 21, 1986.